Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-764

RICHARD CRISP, Warden, Oklahoma State Penitentiary, McAlester, Oklahoma, *Petitioner*,
VERSUS
LOUIS J. BROMLEY, *Respondent*.

STATE OF OKLAHOMA, *Petitioner*,
VERSUS
DAVID LEE GARNER, *Respondent*.

JERRY SUNDERLAND, *Petitioner*,
VERSUS
GARY MICHAEL RUTLEDGE, *Respondent*.

DAVE FAULKNER, *Petitioner*,
VERSUS
BILLY J. KILLION, DELMAR EUGENE HANLEY, and DEREK LEE WILSON, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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November, 1977

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In the
Supreme Court of the United States
OCTOBER TERM, 1977

No. .....

RICHARD CRISP, Warden, Oklahoma State Penitentiary, McAlester, Oklahoma, *Petitioner*,
VERSUS
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VERSUS
BILLY J. KILLION, DELMAR EUGENE HANLEY, and DEREK LEE WILSON, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Comes now the Attorney General of the State of Oklahoma, on behalf of the petitioners, and respectfully prays that a writ of certiorari issue to review the opinions of the United States Court of Appeals for the Tenth Circuit entered in the proceedings on April 12, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported. The opinion of the United States Court of Appeals for the Tenth Circuit, sitting en banc, was rendered on the 12th day of April, 1977 (Appendix A). A Petition for Rehearing En Banc was timely filed. The Court denied rehearing in an Order dated September 2, 1977. A corrected Order, also denying the Petition for Rehearing was filed by the Court on September 6, 1977; the Court in said Order amended the original opinion of the Court inserting a new page 14 (the corrected opinion is reflected in Appendix A).

The opinion of the United States District Court for the Western District of Oklahoma in the case styled *Louis J. Bromley* v. *State of Oklahoma*, Case No. CIV-75-0401-E, is unreported. The opinion, rendered by the Honorable Luther B. Eubanks, was entered on the 30th day of June, 1975 (Appendix B).

The opinion of the United States District Court for the Western District of Oklahoma in the case styled *Gary Michael Rutledge* v. *Jerry Sunderland*, Case No. CIV-75-0556-E, was rendered by the Honorable Luther B. Eubanks on the 21st day of October, 1975 (Appendix C).

The opinion of the United States District Court for the Northern District of Oklahoma in the cases styled *Billy J. Killion and Delmar Eugene Hanley* v. *Dave Faulkner, et al.*, was rendered by the Honorable Allen Barrow on the 22nd day of December, 1975 (Appendix D).

The opinion of the United States District Court for the Western District of Oklahoma in the case styled *David Lee Garner* v. *State of Oklahoma*, Case No. CIV-74-336-E, was rendered by the Honorable Luther B. Eubanks on the 8th day of September, 1975 (Appendix E).

The opinion of the United States District Court for the Northern District of Oklahoma in the case styled *Derek Lee Wilson* v. *Dave Faulkner, et al.*, was rendered by the Honorable Allen Barrow in Case No. 75-C-227 on the 22nd day of December, 1975 (Appendix F).

On the 4th day of February, 1976, the Court of Appeals for the Tenth Circuit ordered the companioning of the cases for purposes of briefing and argument (Appendix G).

JURISDICTION

The opinion filed on April 12, 1977, is now presented for review. This Petition for Certiorari was filed within ninety (90) days of the date the appellate court denied the Petitions for Rehearing. This Court's jurisdiction is invoked under 28 U.S.C., § 1254(1).

QUESTIONS PRESENTED

1. Should a decision which holds that a uniform age of criminal responsibility must be sustained for both males and females be given prospective application only?

2. Did the Court of Appeals misapply this Court's decision in *Lefkowitz* v. *Newsome*, 420 U.S. 283, 95 S.Ct. 886, 43 L.Ed.2d 196 (1975), and thereby err by failing to determine if the pleas of guilty waived the defects being challenged by the habeas applicants?

STATUTORY PROVISIONS CITED

Title 10 O.S. Supp. 1969, § 1101(a), stated in pertinent part:

> "The term 'delinquent child' means (1) any male person under the age of sixteen (16) years and any female person under the age of eighteen (18) years, who has violated any federal or state law or municipal ordinance, excepting a traffic statute or ordinance, or any lawful order of the court made under this act; (2) a child who has habitually violated traffic laws or ordinances."

STATEMENT

The six respondents initiated habeas corpus actions in the respective federal district courts challenging numerous criminal convictions on the ground that they were unconstitutional due to a sex-based discriminatory provision of the Oklahoma Juvenile Code which allowed male youths 16 and 17 years of age to be prosecuted as adults while females of those ages were treated under the Juvenile Code unless first certified to stand trial as adults (10 O.S. Supp. 1969, § 1101(a), and its predecessor 10 O.S. 1941, § 101). In *Lamb* v. *Brown*, 456 F.2d 18 (10th Cir. 1972), the Tenth Circuit Court of Appeals held the 1969 statute invalid under the Equal Protection Clause of the United States Constitution due to the age-sex discrimination. In *Lamb* v. *Brown*, the Court stated "this ruling shall not apply retroactively," 456 F.2d at 20. However, in *Radcliff* v. *Anderson*, 509 F.2d 1093 (10th Cir. 1975), *cert. den.* 421 U.S. 939, the Court concluded that the principles of basic fairness and essential justice required retroactive application of the *Lamb* de-

cision and, thus, all criminal convictions rendered against sixteen (16) and seventeen (17) year old males from 1969 to 1972 were void. In the cases at bar, the Tenth Circuit Court again addressed the question of retroactivity and the validity of the convictions; the Court extended the effect of the *Lamb* decision retroactively to 1941. However, in this last review, the appellate court stated that the criminal convictions were not void *per se* but were voidable. The Court adopted the position that *nunc pro tunc* hearings could be held to determine if the habeas applicant would have been certified as an adult. If such a determination was made, the conviction would stand because the failure of the State to afford a timely certification hearing was not prejudicial.

The individual criminal cases involved in the habeas challenges are as follows: Louis J. Bromley (District Court No. CIV-75-401-E, Appellate No. 75-1593) challenged the validity of four state convictions, to-wit: Case No. CRF-71-2636 (Assault and Battery With a Dangerous Weapon); CRF-74-403 and CRF-74-404 (Burglary in the Second Degree, After Former Conviction of a Felony); CRF-74-405 (Robbery With Firearms, After Former Conviction of a Felony). Petitioner was under the age of 18 years at the time of the 1971 convictions; the 1971 conviction was used to enhance punishment in the 1974 convictions. All convictions were obtained pursuant to pleas of guilty.

Gary Michael Rutledge (District Court No. CIV-75-0556-E, Appellate No. 75-1968) challenged a recidivist conviction, State Case No. CRF-73-81, wherein he was convicted for the offense of Distribution of a Controlled Dangerous Substance, LSD, After Former Conviction of a Felony. Two

prior convictions were used to enhance punishment, Case Nos. CRF-70-66 and CRF-70-67. Rutledge maintained that the 1970 convictions were obtained while he was under the age of 18 years.

Billy J. Killion (District Court No. 75-C-220, Appellate No. 76-1043) was challenging a 1959 case, Case No. 17,919, wherein he was tried before a jury for the offense of Murder.

Delmar Eugene Hanley (District Court No. 75-C-220, Appellate No. 76-1043) was challenging the validity of three 1968 convictions, to-wit: No. 23,363 (Robbery With Firearms, a twenty-year sentence), No. 23,361 (Rape in the Second Degree, a fifteen-year sentence), and No. 23,362 (Rape in the Second Degree, a fifteen-year sentence). All sentences were to run concurrently and all convictions were obtained pursuant to pleas of guilty.

Derek Lee Wilson (District Court No. 75-C-227, Appellate No. 76-1044) challenged the validity of five State convictions rendered in 1970 pursuant to pleas of guilty, to-wit: CRF-70-1327 (Possession of Narcotics, a seven-year sentence); CRF-70-1560 (Obtaining Property by False Pretenses, a three-year sentence); CRF-70-1910 (Robbery With Firearms, a twenty-five year sentence); CRF-70-1915 (Burglary in the Second Degree, a five-year sentence); and CRF-70-2012 (Robbery With Firearms, a twenty-five year sentence).

David Lee Garner (District Court No. CIV-74-336-E, Appellate No. 75-1830) challenged the State conviction in Case No. CRF-71-1580 wherein he was convicted for Robbery With Firearms. Said conviction was obtained after

trial by jury. In this action, the District Court conducted a "nunc pro tunc" hearing and determined that "to a moral and legal certainty" Garner would have been certified as an adult and, thus, he was not prejudiced by the failure of the State to afford him a certification hearing.

REASONS FOR GRANTING THE WRIT

I.

Rule 19(1)(b) of the rules of this Court states that a writ of certiorari may be granted in those cases where a court of appeals has rendered its decision in conflict with the decision of another court of appeals in the same matter, or the Circuit Court has decided an important question of federal law which is in conflict with applicable decisions of this Court.

The opinion of the Tenth Circuit Court of Appeals is in conflict with decisions rendered by the Seventh and Fourth Circuit Courts. There are also irreconcilable conflicts between the decisions of the Tenth Circuit Court and the Oklahoma Court of Criminal Appeals and the Maryland Court of Appeals. The conflicting decisions of the respective courts are as follows:

The Tenth Circuit Court of Appeals has held that 10 O.S. 1941, § 101, and 10 O.S. Supp. 1969, § 1101, were unconstitutional and, thus, all criminal convictions rendered against 16 and 17-year-old males between 1941 and 1972 are void absent a showing by the State in a nunc pro tunc certification hearing that the habeas applicant would have been certified as an adult.

The Seventh Circuit Court of Appeals addressed the same issue when the Illinois Juvenile Court Act, which treated 17-year-old males differently than 17-year-old females, was challenged. The Seventh Circuit Court held that the decision that a uniform age of criminal responsibility must be sustained for both males and females does not apply retroactively so as to entitle the habeas applicant relief on equal protection grounds. *United States, ex rel. Watson* v. *Housewright*, 526 F.2d 259 (7th Cir. 1975). Accord, *People* v. *Ellis*, 57 Ill.2d 127, 311 N.E.2d 98 (S.Ct. Ill. 1974).

The federal courts within the Fourth Circuit have issued numerous decisions regarding this same matter. The Federal District Court of Maryland in *Long* v. *Robinson*, 316 F.Supp. 22 (D. Md. 1970), *aff'd* 436 F.2d 1116 (4th Cir. 1971), held a Maryland law unconstitutional which required 16 and 17-year-old persons in the City of Baltimore to be tried as adults whereas other persons of that age in the State of Maryland were under the juvenile court's jurisdiction. In *Long*, supra, the District Court gave effect to the decision declaring unconstitutional the statutory scheme of age discrimination to "all cases not finally decided on May 15, 1969, the date of the filing of this suit," *Long* at 31.

However, in *Woodall* v. *Pettibone*, 465 F.2d 49 (4th Cir. 1972), the Circuit Court extended the effect of the *Long* decision to all persons who were presently incarcerated by virtue of the unconstitutional statute.

The state courts of Maryland have taken exception to the federal rulings. In *Williams* v. *State of Maryland*, 324 A.2d 174 (Court of Special Appeals of Maryland 1974), *aff'd*

344 A.2d 80 (Ct. of App. Md. 1975), the court of Maryland concluded that the federal circuit court misapplied this Court's decisions on retroactivity. The Maryland Court of Appeals held that the benefits of the invalidation of the Maryland statute would extend only to those convictions which were not final before May 15, 1969.

The Oklahoma state courts have taken a similar posture regarding the effect of the federal decisions on the Oklahoma convictions. As early as 1972, the Oklahoma Court of Criminal Appeals, the highest state court hearing criminal cases, determined that the invalidation of the age-sex classification would not affect prior cases. See *Schaffer* v. *Green*, 496 P.2d 375, at 377 through 378 (1972); *Freshour* v. *Turner*, 496 P.2d 389 (Okl. Cr. 1972). In the most recent decision involving the retroactive effect of the Federal Circuit's holdings, the Oklahoma Court of Criminal Appeals in *Dean* v. *Crisp*, 536 P.2d 961 (Okl. Cr. 1975), stated that the state courts were entitled to a differing view on the retroactivity problem, that the federal court decisions were not binding and that only a decision by the Supreme Court would resolve the conflict. The Tenth Circuit Court of Appeals recognized the right of the State to maintain their differing views on retroactivity in the opinion presently before this Court.

Therefore, it is respectfully submitted there is a major conflict in the decisions rendered by the circuit courts and state courts. This conflict cannot be resolved by any further litigation in the federal courts or the state courts. Decisions of the United States District Courts and United States Courts of Appeals, unlike decisions of the United States Supreme Court, are not binding upon the state courts. *Law-*

rence v. *Woods*, 432 F.2d 1072 (7th Cir.), *cert. den.* 402 U.S. 983. Only a decision by this Court can resolve the differing views being expressed by the Tenth, Seventh and Fourth Circuit Courts of Appeals and the state courts in Maryland, Illinois and Oklahoma.

Petitioners also submit that the decision of the Tenth Circuit Court of Appeals is in conflict with this Court's decisions regarding retroactive effect to be given new constitutional pronouncements. This Court's decisions have been reviewed by the Tenth Circuit, Seventh Circuit and Fourth Circuit Courts of Appeals and the highest courts of the States of Illinois, Maryland and Oklahoma. Yet, despite the extensive analysis made by the respective courts, contrary conclusions have been reached.

Petitioners submit that the conclusion reached by the Tenth Circuit Court is in conflict with the decisions of this Court in *Linkletter* v. *Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965); *Williams* v. *United States*, 401 U.S. 646, 91 S.Ct. 1148, 28 L.Ed.2d 388 (1971); *Stovall* v. *Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967); *Gosa* v. *Mayden*, 413 U.S. 665, 93 S.Ct. 2926, 37 L.Ed.2d 873 (1973); *Wolff* v. *McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974).

The court below found no defect, constitutional or otherwise, in the criminal proceeding which resulted in the convictions. Thus, it may be assumed that respondents received the same constitutional protection afforded others accused in criminal proceedings. The constitutional integrity of the adjudicative process which convicted these respondents is not in question. The accuracy of the fact-finding process is not in question.

The purpose of the *Lamb* decision, supra, was to require that persons similarly aged be offered the equal protection of the juvenile court statutory scheme. This purpose was fulfilled when the State Legislature established a uniform age for criminal responsibility in April of 1972.

As reflected by the facts of these cases, full retroactive application of the *Lamb* decision affects all convictions of males aged 16 and 17 years rendered between 1941 to 1972; convictions which were enhanced by "pre-*Lamb*" convictions; and, convictions which were "tainted" because a pre-*Lamb* conviction was used to impeach the defendant's credibility.

Reviewing the purpose to be served by the *Lamb* decision, the extent of reliance by law enforcement authorities, and the effect on the administration of justice, it is submitted that the *Lamb* decision should have been given prospective effect only. Such was the conclusion of the Oklahoma Court of Criminal Appeals in *Schaffer* v. *Green*, supra, the Seventh Circuit Court of Appeals in *Watson* v. *Housewright*, supra, the Illinois Court of Appeals in *People* v. *Ellis*, supra, and the Maryland Court of Appeals in *Williams* v. *Maryland*, 344 A.2d 80 (1975).

The conflicting decisions of the state and federal courts can be resolved only by this Court; thus, it is submitted that certiorari should be granted.

II.

The second issue presented in this Petition is whether or not the appellate court erred by failing to decide if pleas of guilty entered to the charges waived the defect being

challenged, *e.g.* the failure of the State to conduct certification hearings. This question was presented to the Circuit Court in the cases involving habeas applicants Wilson, Hanley, Rutledge and Bromley. The Court stated that specific equal protection claims were considered on the merits by the Oklahoma courts regardless of the pleas of guilty. The Tenth Circuit Court of Appeals cited this Court's opinion in *Lefkowitz* v. *Newsome*, 420 U.S. 283, 292, Note 9, 95 S.Ct. 886, 43 L.Ed.2d 196 (1975), for the proposition that if the state court has entertained a constitutional claim on the merits, the federal court must also determine the merits of the applicant's claim.

A review of the opinions rendered by the State's highest court entertaining the petitions for collateral relief reflect that the Court disposed of the claims by relying upon the Tenth Circuit Court's prior statement that the decision of *Lamb* v. *Brown*, supra, would not be given retroactive effect (Appendices H, I, J and K). The Oklahoma Court maintained that the convictions were valid and that the argument was without merit. Thus, the Court did not consider whether or not pleas of guilty were entered or if there was a trial on the merits.

It is submitted that the Tenth Circuit Court misconstrued this Court's decision in *Lefkowitz* v. *Newsome* and, therefore, erred by failing to determine if the pleas of guilty waived the alleged defects. In *Lefkowitz*, this Court held that, when a state law permits a defendant to plead guilty without forfeiting his right to judicial review of specific constitutional issues, the defendant is not foreclosed from pursuing those claims in a federal habeas corpus proceeding. It is submitted that these cases at bar are distinguishable

from the *Lefkowitz* case. In *Lefkowitz* there was a state law which specifically allowed a defendant to enter a plea of guilty and yet retain the right to appeal the alleged errors. As noted by this Court, the plea was entered with a clear understanding and expectation by the State, petitioner and the court that the plea would not foreclose judicial review on the merits of the alleged constitutional violation. In the cases at bar, there is no analogous State statute, nor was there any expectation by the State, the respective petitioners nor the courts that judicial review on the merits of the alleged constitutional violations would be possible. The Oklahoma Court of Criminal Appeals, in dismissing the request for collateral relief, did not "consider the merits" of the respective cases. The Oklahoma court, at most, made a determination that the convictions being challenged were "pre-*Lamb*" convictions and that the contention of the respective state petitioners were without merit under the Court's previous determination of non-retroactive application of the *Lamb* decision. It is submitted that the summary dismissal of the collateral proceedings did not constitute a "consideration of the case on the merits," as contemplated by this Court in *Lefkowitz*.

Therefore, the Court of Appeals erred by failing to determine whether or not the pleas of guilty waived the defects being challenged.

CONCLUSION

Petitioners respectfully submit that the questions presented to this Court have been addressed by numerous state and federal courts within the last five years. These cases are exemplary of thousands of other convictions in the

States of Oklahoma, Illinois and Maryland which will be affected by a ruling of this Court. Federal courts and state courts are at an impasse.

The state courts of Oklahoma have determined that the convictions challenged are valid for the reason that there was, in fact, no denial of a constitutional right. The courts have determined that the criminal defendants were not statutorily entitled to a juvenile certification hearing; thus, there was no constitutional deprivation. The Tenth Circuit Court has held that there was a denial of equal protection of the law and that the only recourse to validate the conviction is to conduct *nunc pro tunc* hearings in the thousands of convictions which will undoubtedly be challenged should this opinion be allowed to stand.

The conflict of opinions between the federal and state courts can only be resolved by this Court.

Therefore, for the reasons set forth above, petitioners urge that the writ of certiorari be granted.

Respectfully submitted,

LARRY DERRYBERRY
Attorney General of Oklahoma

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112 State Capitol Building
Oklahoma City, Oklahoma 73105

Attorneys for Petitioners

November, 1977

CERTIFICATE OF SERVICE

This is to certify that three (3) true and correct copies of the foregoing instrument were served upon:

Mr. Frederick P. Gilbert
1401 National Bank of Tulsa Building
Tulsa, Oklahoma 74103

Ms. Mary E. Bane
Bane and Williams
217 Investors Capitol Building
Oklahoma City, Oklahoma 73102

Mr. Andrew T. Dalton, Jr.
2536 East 51st Street
Tulsa, Oklahoma 74105

Mr. S. M. Fallis
District Attorney
496 Tulsa County Courthouse
Tulsa, Oklahoma

the only parties to be served, by mailing such true and correct copies, postage prepaid, this ..... day of November, 1977.

.....
KAY KAREN KENNEDY

APPENDIX A

FILED
APR 12 1977
HOWARD K. PHILLIPS
CLERK, UNITED STATES
COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

LOUIS JAY BROMLEY, Petitioner-Appellant, v. RICHARD CRISP, Warden Oklahoma State Penitentiary, McAlester, Oklahoma, Respondent-Appellee	)	NO. 75-1593 (75-0401-E W. D. Okla.)

DAVID LEE GARNER, Petitioner-Appellant, v. THE STATE OF OKLAHOMA, Respondent-Appellee,	)	NO. 75-1830 (74-336-E W. D. Okla.)

GARY MICHAEL RUTLEDGE, Petitioner-Appellant, v. JERRY SUNDERLAND, Warden, Oklahoma State Reformatory, Respondent-Appellee,	)	NO. 75-1968 (75-0556-E W. D. Okla.)

BILLIE JAY KILLION, and
DELMAR EUGENE HANLEY,
Petitioners-Appellants,
v.
DAVE FAULKNER, Sheriff,
Tulsa County, State of Oklahoma,
Respondent-Appellee,

NO. 76-1043
(75-C-220
N. D. Okla.)

DEREK LEE WILSON,
Petitioner-Appellant,
v.
DAVE FAULKNER, Sheriff,
Tulsa County, State of Oklahoma,
Respondent-Appellee,

NO. 76-1044
(75-C-227
N. D. Okla.)

WILLIAM LYNN STRINGFIELD,
Petitioner-Appellee,
v.
JOHN GRIDER, Warden, Oklahoma State Reformatory, Granite, Oklahoma; SAM ISAACS, Probation and Parole Officer, Department of Corrections; RICHARD R. WINTERS, Parole Officer, Oklahoma Department of Corrections,
Respondents-Appellants.

NO. 75-1988
(72-C-236
N. D. Okla.)

APPEALS FROM THE UNITED STATES DISTRICT COURTS FOR THE NORTHERN AND WESTERN DISTRICTS OF OKLAHOMA

Fred P. Gilbert, Attorney, Tulsa, Oklahoma, for Petitioners-Appellants in Nos. 75-1593, 75-1830, 75-1968, 76-1043, 76-1044, and for Petitioner-Appellee in 75-1988 (Andrew T. Dalton, Jr., Tulsa, Oklahoma, on the brief)

Kay Karen Kennedy, Assistant Attorney General, Oklahoma City, Oklahoma (Larry Derryberry, Attorney General of Oklahoma, on the brief) for Respondents-Appellees in Nos. 75-1593, 75-1830, 75-1968, 76-1043, 76-1044, and for Respondents-Appellants in No. 75-1988

Mary E. Bane, of Bane & Williams, Oklahoma City, Oklahoma, for Petitioner-Appellant in No. 75-1968

Marvin E. Spears, Assistant District Attorney, Tulsa, Oklahoma (S. M. Fallis, District Attorney, Tulsa, Oklahoma, on the briefs) for Respondent-Appellee, Faulkner, in Nos. 76-1043 and 76-1044

EN BANC

Before LEWIS, Chief Judge, HILL, SETH, HOLLOWAY, McWILLIAMS, BARRETT and DOYLE, Circuit Judges

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HOLLOWAY, Circuit Judge

These habeas suits present various questions arising from the unconstitutionality of Oklahoma juvenile code provisions which have been held invalid due to a sex-based discriminatory provision allowing male youths 16 and 17 years of age to be prosecuted as adults under the State criminal laws while requiring that females of those ages be treated under the juvenile code of Oklahoma unless first certified to stand trial as adults. See 10 O.S.Supp. 1969 § 1101(a). In Lamb v. Brown, 456 F.2d 18 (10th Cir.), we held that statute invalid under the Equal Protection Clause due to the sex-based discrimination since no adequate basis

for the different treatment was shown. The Oklahoma court made similar rulings on sexual disparities in the children's code. Schaffer v. Green, 496 P.2d 375, 377 (Okla.Crim.).

In Lamb v. Brown, we stated that "[t]his ruling shall not apply retroactively." 456 F.2d at 20. On varying theories, the Oklahoma Courts have also held that the invalidation of the sex-based differentiation does not affect prior cases. See Schaffer v. Green, supra. 496 P.2d at 377-78; Freshour v. Turner, 496 P.2d 389 (Okla.Crim.); Dean v. Crisp, 536 P.2d 961 (Okla.Crim.).[1] However, in Radcliff v. Anderson, 509 F.2d 1093 (10th Cir.), cert. denied, 421 U.S. 939, the question of retroactivity of the equal protection holding on the Oklahoma statute was presented for decision and we concluded that principles of basic fairness and essential justice required retroactive application of the *Lamb* decision. Id. at 1096.[2]

The petitioners in these cases asserted claims in State courts under the *Lamb* and *Radcliff* principles for relief from prior convictions on the ground that their treatment as adult males at 16 or 17 denied their equal protection rights. After denial of State court relief these federal habeas suits were brought in the Northern and Western Districts of Oklahoma, and the cases have now reached us.

As the trial court noted in the Garner case (No. 75-1830), in a federal habeas suit the question whether the

[1] Dean v. Crisp overruled that part of the holdings in *Schaffer* and *Freshhour* which had made some earlier non-discriminatory statutes applicable to fill the "void" following the *Lamb* opinion. The *Dean* opinion also recognized the invalidity of the discriminatory statutes in force since 1941. It held, however, that these statutes were supplanted by the 1909 statute which defined a "delinquent child" as any child under 16 violating any federal or state law, or any city or village ordinance. See 536 P.2d at 964.

[2] We note that the Seventh Circuit has subsequently disagreed with our retroactivity holding. United States ex rel Watson v. Housewright, 528 F.2d 259. The State here requests that we re-examine and alter our *Radcliff* holding. (Brief of Respondents-Appellees, 37-38). However, we remain convinced of its correctness.

conviction can stand in view of the violation of the Equal Protection Clause is a federal question, just as the meaning of the Clause itself is a federal question. Chapman v. California, 386 U.S. 18, 21. Hence the retroactivity of the *Lamb* principal is a federal question. See Sessor v. Gunn, 529 F.2d 932, 935 (9th Cir.), cert. denied, ___ U.S. ___, 45 U.S.L.W. 3572. We recognize that the State Courts are fully entitled to decide such federal questions when presented to them, as they have, and we have carefully considered their opinions on the retroactivity problem. We agree with the Oklahoma Court of Criminal Appeals in its view in Dean v. Crisp, supra, 536 P.2d at 963, that the Oklahoma Courts may express their differing views on the retroactivity problem or similar federal questions until we are all guided by a binding decision of the Supreme Court. See United States ex rel Lawrence v. Woods, 432 F.2d 1072 (7th Cir.), cert. denied, 402 U.S. 983. Nevertheless, when habeas cases are properly before the federal courts they must decide federal questions such as are presented here, giving the conclusion of the State Court the weight of a decision of a court of last resort of another jurisdiction.[3] See Fay v. Noia, 372 U.S. 391, 421-24; Brown v. Allen, 344 U.S. 443, 458; Sessor v. Gunn, supra. at 935.

The seven cases before us now involve similar basic problems flowing from the prior inequality of treatment of male youths. In No. 75-1988, Stringfield v. Grider, the district court granted the writ on the basis of the *Radcliff* decision.[4] In the remaining cases, federal habeas relief was denied on different grounds which we will detail in discussing the appeals.

[3] See the discussion of the State court interpretations of Oklahoma law subsequent to the *Lamb* decision in No. 76-1013 (Hanley) and No. 76-1044 (Wilson), infra.

[4] The *Radcliff* opinion decided consolidated appeals of both Stringfield and Radcliff. It affirmed a ruling that Stringfield was entitled to a writ. The judgment finally entered granted a writ and other relief and the respondent warden has appealed.

No. 75-1830—Garner v. State of Oklahoma

In 1972 at age 17, petitioner Garner was convicted in a jury trial of robbery with firearms and sentenced to 18 years' imprisonment. He was prosecuted as an adult, without certification which was then required if a girl of that age was to be prosecuted as an adult. His conviction was affirmed on direct appeal. Garner v. State, 500 P.2d 1340 (Okla.Crim.). Garner then sought post-conviction relief in the Oklahoma courts, which was denied.

This federal habeas action was then brought for relief under the Equal Protection Clause, alleging discriminatory treatment against Garner on the basis of sex. The trial court conducted an evidentiary hearing. The court found that to a moral and legal certainty no juvenile court would have denied transfer for treatment as an adult, that the gravity of the offense was such that it would be unreasonable to assume that any court would have denied transfer, that the crime was not an isolated incident but one of several similar crimes, and that there was no reasonable doubt that certification would have been granted. (R. I., 137-38). The writ was denied and this appeal followed.

We turn to the main points argued for reversal. A brief of counsel and a pro se brief were combined for Garner and we have reviewed all the contentions raised.

First, petitioner says there was absolutely no evidence to support the district court's finding, nunc pro tunc, that he would have been certified to stand trial as an adult (Brief of Appellant Garner, 76-83). He argues that the statutory standard in 1971 consisted solely of whether the juvenile was capable of knowing right from wrong, that there was no independent evidence of his mental or moral state, and that certification had to be proven beyond all doubt and contradiction, citing Ex parte Hightower, 165 P. 624, 626-27 (Okla.Crim.), which was not done.

The State's proof at the federal hearing showed the following: The armed robbery offense in question occurred on June 26, 1971, when petitioner was 17 years of age, his birthdate being May 25, 1954. In 1969 at age 15 he had been made a ward of the juvenile court for delinquency, the child and parents being present. He and his parents were told that the time during a subsequent investigation would be a probationary period. In January, 1970, the child, parents and their attorney were present and Garner admitted he had been apprehended in a car he had taken unlawfully and that he had also taken five other cars in November and December. The court found he should not then be certified but should be given an opportunity in a children's institution and was in need of training to know the consequences of his acts. (R. II, 200).

In January, 1971, he pled guilty to forgery in the second degree and received deferred sentencing treatment, to which conditions for good behavior were attached. In June, 1971, he was then charged with the armed robbery in question. He was also charged with two other offenses, all three occurring on June 26 and 27, 1971. Following his January 6, 1972, jury conviction on the instant robbery charge, on February 10 Garner pled guilty, with counsel present, to included offenses of concealing stolen property on the other June, 1971, charges and received two year concurrent sentences on each.[5]

On February 10, 1972, Garner also pled guilty, with counsel present, to an application and charge to accelerate sentencing on the earlier January, 1971, forgery offense.

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[5] We recognize that these February, 1972, pleas occurred after the January 6, 1972, trial and that a certification would have been considered before that time. However we feel the trial court properly took all these circumstances about the closely related offenses and the acceleration proceeding into account. If a certification proceeding had occurred it is reasonable to assume that substantially all of these circumstances surrounding the other offenses would have been developed for the judge considering certification.

This application alleged violation of the terms of the deferred sentence by the three June, 1971, offenses. Garner answered detailed questions in writing, saying that he understood the charge of violation of the terms of his deferred sentence. He pled guilty and received a further two-year sentence.

Petitioner offered no evidence at the federal evidentiary hearing other than giving his name and birthdate, after which he claimed the privilege against self incrimination. His counsel challenged the sufficiency of the State's proof by proper motions.

As noted, the court found that there was no reasonable doubt that certification would have been granted. We cannot say the finding is clearly erroneous and believe the court gave the problem proper consideration. He referred to petitioner's "full knowledge of the consequences" of his acts, and we feel this was in line with the test for certifying ". . . such child capable of knowing right from wrong, and to be held accountable for his acts. . ." 10 O.S. 1971 § 1112(b); Sherfield v. State, 511 P.2d 598, 601 (Okla. Crim.).

Petitioner vigorously objects that jurisdictional problems bar any such procedure, that the Oklahoma rule is that any adult conviction during the age of juvenility without certification is void, and that the only State remedy would be to start the process anew, not by such a nunc pro tunc finding.

We disagree. The State cases relied on such as Wilson v. State, 82 P.2d 308 (Okla. Crim.) do treat the State's failure to follow the statutory requirement as calling for invalidation of the conviction and a jurisdictional dilemma can be constructed out of reasoning from the cases. We feel, however, that in deciding these habeas cases and in fashioning a remedy as "law and justice require," 28 U.S.C.A. § 2243, see Carafas v. LaVallee, 391 U.S. 234, 239, we can ex-

ercise restraint and need not grant such "drastic relief" as petitioner seeks for the denial of equal protection. See Kent v. United States, 383 U.S. 541, 565. If the court is clearly convinced that the juvenile court would have certified the petitioner for treatment as an adult, we believe the essential justice and basic fairness standard of the *Radcliff* case is satisfied, without violence to the habeas remedy or State law.[6] This procedure is similar to that suggested in Kent v. United States, supra, 383 U.S. at 564-65. See also Woodall v. Pettibone, 465 F.2d 49, 52-53 (4th Cir.), cert. denied, 413 U.S. 922; Brown v. Cox, 481 F.2d 622, 627 (4th Cir.), cert. denied, 414 U.S. 1136; Powell v. Hocker, 453 F.2d 652 (9th Cir.), overruled on other grounds, 498 F.2d 579; Kemplen v. Maryland, 428 F.2d 169, 178 (4th Cir.); Black v. United States, 355 F.2d 104 (D.C. Cir.); but see Mordecai v. United

[6] In this case the hearing has been held by the district court and the proper determination has been made, which we feel is not in error. In these circumstances we are satisfied we should affirm.

In cases where such a determination has not been made but is necessary to dispose of a federal habeas petition, we feel it preferable that the district court withhold judgment for a reasonable time to permit the determination to be made in the State courts. See Kemplen v. Maryland, supra, 428 F.2d at 178; Booker v. Phillips, 418 F.2d 424, 427 (10th Cir.), cert. denied, 399 U.S. 910. If the State obtains in the Oklahoma courts a determination that certification would have occurred, then on a showing of such determination, the federal district court should deny the writ; if the State court finding is otherwise, the writ should issue Further, failing a State court ruling as to whether petitioner would have been certified, then the federal district court may have the hearing and make the ruling as to whether or not the court is clearly convinced that the petitioner would have been certified for trial as an adult, and then make proper disposition.

We recognize the fact that the determinations whether certifications would have been made will, in some of these cases decided today, relate to circumstances a few or quite a number of years back. See Pate v. Robinson, 383 U.S. 375, 387. However, the burden of proof and persuasion will rest on the State. The court can take into account all doubts that arise, and any weakness of proof, because of the passage of time as factors against the State. This will afford substantial protection to the petitioners from the fact that the determinations will concern circumstances in earlier years.

States, 421 F.2d 1133, 1135, 1138-39 (D.C. Cir.), cert. denied, 397 U.S. 977; and Wilson v. Reagan, 354 F.2d 45, 46 (9th Cir.). Where the judge in the federal habeas case is clearly convinced that certification would have been made in the State court, the conviction need not be set aside in these circumstances.

Petitioner Garner maintains that the *Lamb* and *Radcliff* opinions themselves rejected the possible procedure of a hearing to determine whether he would have been certified. (Brief of Appellant Garner, 2-4). While the opinions did not discuss the possibilities of such procedures in *Radcliff*,[7] we did affirm the granting of a writ to Stringfield and its practical effect was to rule out the further hearings we are providing for in these cases. However, in reviewing these problems again, en banc, we feel it proper to consider the advisability of such hearings which can provide for a fair disposition without summarily granting the writs.

Further, Garner argues that in any event no procedure for certification or for a determination as was made in the district court is possible because the certification statute, 10 O.S. 1971 § 1112(b), is void for vagueness. The statute essentially provides a standard for the court in its discretion to certify "such child capable of knowing right from wrong, and to be held accountable for his acts. . ." In Sherfield v. State, supra, 511 P.2d at 602, the same point was considered and rejected, and we agree. The statute is sufficiently clear under due process standards.

Petitioner Garner also claims error in the refusal of the trial court to grant a continuance so that he could obtain statistical data to support his claim that the juvenile certification statute was unconstitutional as applied. The argu-

[7] In Judge Seth's dissent we note the statement that: "[i]t is still an unknown factor and ignored by the majority whether the juvenile court would nevertheless have certified these or many others of the many offenders as adults." 509 F.2d at 1099.

ment essentially made the point that no girls had been certified over the 30 years when the discriminatory treatment existed and that these facts should be developed. (R. IV, 2-3 et seq.). Reference is also made to figures concerning Tulsa County appended to the briefs filed in *Radcliff*, supra. There was not, however, any persuasive showing to the trial court of probable proof to be developed to actually demonstrate any constitutional wrong. We find no abuse of discretion or error in the ruling of the court.

Lastly, Garner argues vigorously that a denial of equal protection also occurred in the admission of a confession by him contrary to 21 O.S. 1971 § 1109(b). The statute essentially bars admission into evidence of any statement "gained by questioning a child" unless it is in the presence of the "child's parents, guardian, attorney or the legal custodian of the child." Garner says that since no 17 year old girl could have had the confession used against her, a 17 year old boy was entitled to the same treatment. The statute, however, made no such unequal provision at the time of Garner's offense and trial. Despite the sexual disparity in 10 O.S. 1971 §§ 1101(a) and 1101A in defining "delinquent child," the definition of "child" generally appeared uniform —"*any* person under the age of eighteen (18) years." 10 O.S. 1971 § 1101A (emphasis added), and any error of State law in applying the statute would not be cognizable in a federal habeas suit. Pierce v. Page, 362 F.2d 534, 535 (10th Cir.). However, Garner's counsel points out that a State three-judge district court panel held § 1101A invalid in November, 1971, prior to Garner's January, 1972 trial. The upshot was that in the county of his trial, Garner may have been subject to an age-sex disparity in the application of the statute barring admission of children's confessions not made under prescribed conditions.[8]

[8] See Opinion of the Judges, No. 185000, District Court of Oklahoma County (unpublished). This opinion held §1101A (defining child as any person under 18) invalid under the State constitutional provisions

Nevertheless we agree with the federal district court that exhaustion of State remedies has not occurred on this claim. There is no showing that Garner asserted in his direct appeal or his State post-conviction case that § 1109(a) barred admission of the confession—or that any claim was made of denial of equal protection in its admission.[8a] Thus no equal protection claim was made in the State court which is substantially equivalent to that made here. See Picard v. Connor, 404 U.S. 270, 278; Pritchess v. Davis, 421 U.S. 482, 487. Moreover we feel that the State courts can best determine whether an actual age-sex discrimination occurred in these circumstances.[8b]

In sum, we feel that the district court properly considered the equal protection claim and find no error on any of the grounds argued. The record supports the court's finding that Garner would have been certified in any event for trial as an adult. We, therefore agree with the trial court's conclusion that the conviction in question should not be held invalid, and affirm the judgment in this case.

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[8] (Continued)
on subject matter and titles of legislative acts, as did Schaffer v. Green, 496 P.2d 375 (Okla.Crim.), two months after Garner's trial.

We cannot be sure, however, that an actual age-sex discrimination was practiced at the time of Garner's trial under the §1109(a) restriction on use of children's confessions. The three-judge opinion decided the question whether males 16 and 17 had to be certified for adult trial and had limiting language on the scope of its ruling on the unconstitutionality of §1101A. It is not clear that this ruling was applied to the definition of child for the purposes of §1109(a).

[8a] The claim of denial of equal protection in admission of the confession was not made in Garner's direct appeal or State post-conviction case. In Garner's post-conviction case he directed an equal protection claim solely at the disparity of certification ages. In his direct appeal the confession's admission was challenged, but not under §1109(a) nor as a denial of equal protection. The challenge made to the confession was rejected on the ground that Garner made an understanding waiver of his rights. See 500 P.2d at 1341-42.

[8b] Garner argues that exhaustion of State processes should not be required because they would be futile in view of Dean v. Crisp, *supra, inter alia*. However, we find no Oklahoma case dealing with the §1109(a) confession statute and an equal protection claim such as Garner's. In view of the uncertainties clouding the problem, we cannot agree that State processes would clearly be unavailing. See Wade v. Mayo, 334 U.S. 672, 679.

No. 75-1593—Bromley v. Crisp
No. 75-1968—Rutledge v. Sunderland

These cases involve questions flowing from pleas of guilty, along with common equal protection problems, and thus can conveniently be treated together.

In January, 1971, when he was 17 and represented by counsel, Rutledge pled guilty to two counts of grand larceny. This was an adult prosecution without certification for treatment as an adult. He was sentenced to two concurrent 2½ year terms. In 1973, he was convicted after a not guilty plea of possession of a controlled substance after former conviction of a felony. He received the minimum sentence for this conviction—10 years. This conviction was affirmed on direct appeal. Rutledge v. State, 527 P.2d 1373 (Okla. Crim.).

Rutledge unsuccessfully sought post-conviction relief in the State district court, claiming violation of the Equal Protection Clause in the use of the 1971 conviction to premise the 1973 recidivist convictions. He then asserted his constitutional claim in this federal habeas action where relief was denied on the ground that his pleas of guilty had waived earlier defects in the State court proceedings. This appeal followed.

The Bromley case has a similar background. In 1972, while he was 17 and represented by counsel, Bromley pled guilty to a charge of assault and battery with a dangerous weapon. He received a suspended sentence. In March, 1974, he pled guilty to two charges of second degree burglary after former conviction of a felony, and to one charge of robbery with firearms after former conviction of a felony.

He received three concurrent 22-year sentences. The former conviction premising all three of these recidivist convictions was the assault and battery conviction in 1972 when he was prosecuted as an adult without certification for such treatment.

After the 1974 convictions, Bromley unsuccessfully sought post-conviction relief in the State courts, asserting that the former enhancing conviction was invalid under the *Lamb* equal protection holding. He then brought this federal habeas suit where his constitutional claim was rejected on the ground that the plea of guilty had waived the prior defects alleged. This appeal followed.

The State argues that the rulings were correct, saying that the guilty plea prevents assertion of claims of earlier deprivation of constitutional rights. It relies on Brady v. United States, 397 U.S. 742; McMann v. Richardson, 397 U.S. 759; and Parker v. North Carolina, 397 U.S. 790, and the more recent decision in Tollett v. Henderson, 411 U.S. 258, as well as Acuna v. Baker, 418 F.2d 639 (10th Cir.) (en banc) and similar cases in our court.

The *Brady* trilogy has been said to have "announced the general rule that a guilty plea, intelligently and voluntarily made, bars the later assertion of constitutional challenges to the pretrial proceedings." Lefkowitz v. Newsome, 420 U.S. 283, 288; see also Tollett v. Henderson, 411 U.S. 258, 267. Our holdings in Chlaunch v. Page, 427 F.2d 841, 843 (10th Cir.), cert. denied, 401 U.S. 957; Acuna v. Baker, supra, 418 F.2d at 640, and Salazar v. Rodriguez, 371 F.2d 726 (10th Cir.), were to the same general effect. On the other hand, petitioners point to Blackledge v. Perry, 417 U.S. 21, and Menna v. New York, 423 U.S. 61, and maintain that the preclusive effects of guilty pleas do not apply where the constitutional claims go "to the very power of the State to bring the defendant into court to answer the charge brought against him." *Blackledge*, supra at 30. And we note that the Court has said that *Tollett*, *Brady* and *McMann* do

not "stand for the proposition that counseled guilty pleas inevitably 'waive' all antecedent constitutional violations." *Menna*, supra at 62n.2.

We feel that disposition of these conflicting arguments is not required in these appeals. The petitioners make a narrower contention that their specific equal protection claims were considered on the merits by the Oklahoma courts despite the guilty pleas and that, in such event, the federal court in a habeas corpus suit should likewise entertain the claims. We must agree that this position has merit. In Lefkowitz v. Newsome, supra, 420 U.S. at 292n.9,[9] a guilty plea case, the Court admonished that:

> In Fay v. Noia, *supra* the Court held that a federal habeas judge may deny relief to an applicant who has deliberately bypassed the orderly state-court procedures for reviewing his constitutional claim. *But the Court also held that if the state courts have entertained the federal constitutional claims on the merits in a subsequent proceeding, notwithstanding the deliberate bypass, the federal courts have no discretion to deny the applicant habeas relief to which he is otherwise entitled. It would seem to follow necessarily that when there is no bypass of state appellate procedures, deliberate or otherwise, and the state courts entertained the*

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[9] The Court held in *Lefkowitz*, supra at 293, that:

> . . . when state law permits a defendant to plead guilty without forfeiting his right to judicial review of specified constitutional issues, the defendant is not foreclosed from pursuing those constitutional claims in a federal habeas corpus proceeding.

Because of the particular facts before us in the Bromley and Rutledge cases, we need not detrmine whether the Oklahoma rule on consideration of such claims after guilty pleas comes within this holding, as petitioners argue. Compare Ex parte Brown, 278 P. 671 (Okla. Crim.) with McFarlin v. State, 554 P.2d 56, 62 (Okla. Crim.). Our disposition on the guilty plea questions in these cases is made instead on the basis of the fact that the constitutional claims in these very cases *were* considered on the merits by the State courts.

federal claims on the merits, a federal habeas corpus court must also determine the merits of the applicant's claim. (Emphasis added) (citations omitted).

We have a further reminder that constitutional claims are not to be rejected in federal habeas suits on grounds of waiver where the state courts have considered the claims on their merits: "In a case where the state courts have declined to impose a waiver but have considered the merits of the prisoner's claim, different considerations would, of course, be applicable. See *Lefkowitz* v. *Newsome*, 420 U.S. 283." Francis v. Henderson, 425 U.S. 536, 542n.5. The Court recently applied this rule for entertaining constitutional claims on the merits in federal habeas suits where the state courts have thus considered them in Newman v. Henderson, 425 U. S. 967, vacating a judgment and remanding a Fifth Circuit case for further consideration in light of the statements from the *Lefkowitz* and *Francis* cases we have quoted above.[10] See also Estelle v. Williams, 425 U.S. 501, 525 (dissenting opinion of Mr. Justice Brennan).

The facts on the State court treatment of the equal protection claims of these petitioners are not in dispute. In the direct appeal from Rutledge's recidivist convictions, the court considered and rejected the constitutional claim on its merits. See Rutledge v. State, 527 P.2d 1373, 1375 (Okla.Crim.). Rutledge also brought a state post-conviction proceeding in which his claim was rejected on the authority

[10] *Francis* and *Newman* were cases which the Fifth Circuit had considered together, applying the waiver rule of Davis v. United States, 411 U.S. 233, in both of the habeas appeals. See Newman v. Henderson, 496 F.2d 896, 898-99. In the Supreme Court the result was that where Francis had not received consideration of his constitutional claim on the merits by the state courts, the Fifth Circuit's ruling was affirmed. 423 U.S. at 542. But where the merits of Newman's claim had been ruled on by the state court, the judgment was vacated and the case remanded. 425 U.S. 967. Disposition of the constitutional claim on the merits followed in the Court of Appeals. See Newman v. Henderson, 539 F.2d 502, 504 (5th Cir.).

of the adverse ruling in his direct appeal. In Bromley's federal habeas case he alleged earlier rejection of his claim on the basis of Freshour v. Turner, 496 P.2d 389 (Okla. Crim.) by the State district and appellate courts. The order of the Court of Criminal Appeals, No. PC-74-474, confirms that the disposition of the constitutional claim was on the merits. In these circumstances we feel that the constitutional claims of both petitioners must likewise be considered on their merits in these federal habeas suits, despite the guilty pleas. *Lefkowitz*, supra at 292n.9; see Fay v. Noia, 372 U.S. 391, 439.

Accordingly, the judgments in Nos. 75-1593 and 75-1968 are vacated. These cases are remanded for further proceedings in accordance with the procedure outlined in the Garner case, note 6, supra. As there discussed, the trial court should withhold judgment for a reasonable time to permit a State court determination to be made as to whether petitioners would have been certified, or failing that, the federal court may itself make a determination as to whether or not it is clearly convinced that certification would have occurred, and make proper disposition of the petitions thereafter.

No. 76-1043—Hanley v. Faulkner
No. 76-1044—Wilson v. Faulkner

These cases have a somewhat complicated background but for our purposes the facts can be simplified as follows:

In 1968 Hanley, then 16, pled guilty to two counts of rape and one of robbery with firearms. He was sentenced to two 15-year terms and one 20-year term. In 1970 Wilson, then 17, pled guilty to possession of narcotics, obtaining property by false pretenses, second degree burglary, and two counts of robbery with firearms. He received sentences of 7, 3, 5, 25 and 25 years, respectively, to be served concurrently. Both petitioners were prosecuted as adults without certification for such treatment.

After temporary release from custody in 1975, by State court orders following our *Radcliff* decision, both Hanley and Wilson were taken into State custody again after the decision in Dean v. Crisp, 536 P.2d 961 (Okla.Crim.). Both petitioners then brought these habeas suits in the Northern District of Oklahoma where relief was denied. These appeals followed.[11]

In denying the petitions, the trial court reasoned that the State court's interpretation on State law jurisdictional points was binding on the federal court; that Schaffer v. Green, 496 P.2d 375 (Okla.Crim.) had held that the void existing after the *Lamb* decision invalidated 10 O.S. Supp. 1969 § 1101(a) was filled by 21 O.S. § 152 (originally enacted in 1910); and that under the resulting state of the law, as so interpreted, all persons over the age of 14 were within the jurisdiction of the State courts for prosecution as adults, without regard to sex. Hence, it was held that relief should be denied.

We cannot agree. Without doubt, the State courts are fully empowered to construe their statutes and to determine rules of State law and we must accept those determinations. However, we are faced with a substantial federal question as to whether at the time the challenged convictions were imposed there was a violation of the Equal Protection Clause by reason of disparity in treatment of male and female youths. The reality of State law as it then existed and was applied controls, and not an *ex post facto* restructuring of the statutes. We are persuaded by the reasoning of the district court in No. 75-1830, Garner v. State of Oklahoma:

[11] Although pleas of guilty were entered in these cases, the State court considered the equal protection claim of both petitioners on the merits as in the Bromley and Rutledge cases. Hence we must reject any argument for affirmance based on the theory that the guilty pleas preclude assertion of the equal protection claim.

> The fact is, and it is undeniable, that at the time of petitioner's conviction Oklahoma did accord to girls the favored treatment. This petitioner was discriminated against by the State. There was a denial by the State of equal protection to the petitioner, and the taint of discrimination is not removed from the conviction by the retrospective view that he received all the protection he was entitled to under a proper interpretation of constitutionally sound Oklahoma law. The fallacy of such view lies in its disregard of the federal constitutional reality. He was entitled to equal protection. He was entitled to the same treatment as the favored class. In short, it was the treatment that he received which flaws the proceedings.

The State clearly may make the necessary statutory repairs or judicial interpretation of State law to remove unconstitutional inequities after an equal protection violation is recognized. See Craig v. Boren, 96 Sup. Ct., 451, 463n.24; Stanton v. Stanton, 421 U.S. 7, 17-18. Nevertheless, it remains a federal question, which is now before us, whether the past convictions were afflicted by a denial of equal protection so that they cannot stand. See Chapman v. California, 386 U.S. 18, 21. We must decide this question on the basis of the laws actually applied when the challenged convictions occurred. Cf. Yick Wo v. Hopkins, 118 U.S. 356, 373-74. In view of the fact that there was actual discriminatory treatment under the statutes then in force, we hold that there was a violation of the Equal Protection Clause.

In Hanley's case, 10 O.S. 1961 § 101 is involved, and not the 1969-1972 statute held invalid in *Lamb*. Nevertheless, we see no justification for a difference in result, and the State offers none. In fact, the Oklahoma Court held that similar statutes on the books from 1941 to 1972 were invalid due to the sexually discriminatory provisions. Dean v. Crisp, supra, 536 P.2d at 964. We must agree and conclude that the

discriminatory 1961 statute applicable in Hanley's case caused a denial of equal protection to him.

Accordingly these judgments must be vacated as to petitioners Hanley and Wilson, and the cases are remanded to the trial court for further proceedings as outlined in Bromley—No. 75-1593, Rutledge—No. 75-1968, and Garner —No. 75-1830, note 6, supra, with respect to the challenged 1968 and 1970 convictions.

No. 76-1043—Killion v. Faulkner

In 1959, at age 17, Billie Jay Killion was convicted of murder and received a life sentence. This was an adult prosecution, without certification for treatment as an adult. After our *Radcliff* decision, Killion unsuccessfully sought post-conviction relief in the State courts, challenging his conviction under the *Lamb* and *Radcliff* decisions.

Petitioner Killion then joined Hanley in bringing a habeas proceeding in the Northern District of Oklahoma. As noted above, the trial court denied relief on that petition on the basis that it was bound by the interpretation of state law in Schaffer v. Green, 496 P.2d 375 (Okla.Crim.). The reasoning was that in view of the State Court's interpretation that older statutes without any inequity as to sex (21 O.S. § 152), see Schaffer v. Green, supra at 377, applied to fill the void after the *Lamb* ruling, there was no equal protection problem. Killion appealed.

We discuss his case separately because of procedural differences we should note. Killion was tried under statutes with special population provisions resulting in the creation of juvenile courts in Tulsa and Oklahoma Counties. See 20 O.S. 1951 § 771 *et seq*. Parts of the special statute would have treated both males and females as juveniles until the age of 18, therefore making certification of both groups necessary before prosecution as adults. See 20 O.S. 1951 §§ 772-74. However before Killion was tried, these sections of the statute were held invalid as a "special law" under

the State Constitution. Anderson v. Walker, 333 P.2d 570, 575 (Okla.Crim.); Killion v. Walker, 334 P.2d 454, 455 (Okla.Crim.). The result was that the general laws, 10 O.S. 1951 § 101, applied in Killion's case and this section contained a provision with the fatal inequality in treatment of the sexes.

Thus the same basic equal protection problem is involved, although here the 1951 statute is in question, not the 1969-1972 statute invalidated in *Lamb*. Again we see no reason why there should be a difference in result. As noted above, the Oklahoma Court held the statutes on the books from 1941 until 1972 were invalid due to sexually discriminatory provisions. Dean v. Crisp, supra, 536 P.2d at 964. We conclude that the discriminatory 1951 statute, applicable in Killion's case, caused a denial of equal protection to him.

Furthermore, as discussed in treating the Hanley and Wilson cases, we cannot agree that there was no denial of equal protection on the theory that an earlier, non-discriminatory statute filled the void of the invalid one. The reality of the law as it existed and applied controls, under which the denial of equal protection is clear.

For reasons stated, we hold that there was a denial of equal protection in the proceeding where Killion's conviction was obtained. Accordingly, the trial court's judgment is vacated as to Killion and the case is remanded for further proceedings as in Bromley—No. 75-1593, Rutledge—No. 75-1968, and Garner—No. 75-1830, note 6, supra. With the burden of proof and persuasion resting on the State to demonstrate that such certification would have occurred, we feel there is sufficient protection for the petitioner. We are aware of the difficulty of the determination whether certification would have been made in 1959 before Killion's trial. However, for reasons given in note 6, supra, we feel this is the best solution in a difficult situation, balancing the interests of the State and the individual.

No. 75-1988—Stringfield v. Grider

In March, 1971, petitioner Stringfield, who was then 17, pled guilty to the charge of second degree burglary. The imposition of sentence was deferred for two years under Oklahoma's "deferred sentencing" law then in effect. 22 O.S. 1971 § 991(a). However, in August, 1971, the imposition of his sentence was "accelerated" and he was sentenced to five years' imprisonment. He then unsuccessfully sought review of the conviction on his guilty plea in the Oklahoma Court of Criminal Appeals. A subsequent application for post-conviction relief in the State district court was denied.

Stringfield then sought federal habeas relief. His petition was granted by the district judge who held that our decision in *Lamb* v. *Brown* should be applied retroactively. The court concluded that petitioner's conviction was "void" and that the writ should be granted. However, since Stringfield was then out on parole, the court stayed formal issuance of the writ pending the disposition of the State's appeal. The appeal was decided in Radcliff v. Anderson, supra, which affirmed the district court's judgment. 509 F.2d at 1096.

After issuance of the mandate the district court entered a "Final Judgment on Remand." The order provided, inter alia, that the journal entry in the *Lamb* case would be adopted; that the purported felony conviction of Stringfield was "vacated, quashed, set aside, and held for naught, with prejudice"; that a writ of habeas corpus "do issue"; and that all public, official and quasi-official records relating to the conviction be expunged. This appeal followed.

The State urges several grounds for reversal, but a preliminary issue must be considered first. Petitioner contends that principles of res judicata and the law of the case bar consideration of the State's claims of error in granting the writ. While we are not persuaded by the res judicata

argument in this habeas case, see Fay v. Noia, 372 U.S. 391, 423, we are convinced that we should apply the doctrine of the law of the case.

"In the absence of statute the phrase, law of the case, as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." Messenger v. Anderson, 225 U.S. 436, 444. The practice is not rigidly binding, but generally an appellate court will not depart from a rule of law established on an earlier appeal in deciding the same issues, except for cogent reasons. United States v. Fernandez, 506 F.2d 1200, 1203-04 (2d Cir.); 1B Moore's Federal Practice ¶0.404[10] at 573-74. The rule has been applied in habeas cases. *E.g.*, McClellan v. Heritage, 234 F.Supp. 219, 220 (N.D. Ga.), aff'd 337 F.2d 239 (5th Cir.).

It is clear from the disposition in the earlier appeal that we affirmed the grant of the writ to Stringfield and the determination that his conviction was void, which is the law of the case. No persuasive reason is advanced why we should alter the prior judgment. No supervening events, such as a change of law, have been demonstrated. See Davis v. United States, 417 U.S. 333, 342. It is true that this disposition differs from that in the other cases being decided today in that we allow the determination to be made as to whether the petitioners in those cases would have been certified, with the possibility that their convictions may stand. Nevertheless, Stringfield prevailed on the earlier appeal and we then were not persuaded to modify the district court's order granting the writ. The circumstances surrounding his conviction of second degree burglary, from which he is on parole, do not convince us now to reopen the judgment in this respect. Therefore, we leave undisturbed the affirmance of the grant of the writ and the holding that the conviction was void.

The State further contends that the district court erred in not withholding the issuance of the writ to permit the State to retry Stringfield. It is true that we have held it an abuse of discretion to order immediate release when constitutional defects may be remedied by further proceedings in the criminal case. Gurule v. Turner, 461 F.2d 1083. 1084 (10th Cir.). In Stringfield's case. however, we affirmed the ruling that he was entitled to a writ and gave no directions for withholding the writ, as we have done in other cases. *E.g.*, Booker v. Phillips. 418 F.2d 424, 427 (10th Cir.). cert. denied, 399 U.S. 910; Lesley v. Oklahoma, 407 F.2d 543. 544 (10th Cir.). Under our judgment affirming the grant of the writ and our mandate, the district court did not err in the issuance of the formal writ.[12]

Further, the State claims error in the district court's order that the records concerning Stringfield's prosecution be expunged. It says the order was an abuse of discretion and was entered without a proper hearing.

At the outset we note that this portion of the judgment is on a different footing than the part granting the writ. As stated earlier, we view the habeas relief itself as properly granted under the mandate in the first appeal. The order to expunge the records, however, was additional relief not within the terms of the mandate. We do not say that it was improper to consider such relief in this habeas action, but the claim for such relief requires further examination.

We have recognized that the power to order the expunging of such records exists. See United States v. Linn, 513 F.2d 925, 927 (10th Cir.). It has been exercised to remove the effects of unconstitutional prosecution. United

[12]As noted earlier, the district court did stay formal issuance of the writ pending the State's first appeal in Stringfield's case. However, the stay order made provision for a stay only until our disposition of that appeal. The record contains no indication that the district court or this court, at the time of our decision of the first appeal, contemplated that issuance of the writ would be further delayed.

States v. McLeod, 385 F.2d 734, 750 (5th Cir.). Nevertheless, the power is a narrow one, reserved for extreme cases. See United States v. Linn, supra at 927; United States v. Seasholtz, 376 F.Supp. 1288, 1289 (N.D. Okla.). There should be a balancing of the interests of the State in maintaining records for law enforcement against the individual's rights.

From the terms of the judgment, we find it clear that the district court ordered expungement and other relief for Stringfield because the court felt bound to follow the judgment in *Lamb*. This was understandable in that the en banc order denying rehearing in *Radcliff* said that "[b]asic fairness and essential justice demand that these petitioners be treated no differently than the petitioner in Lamb." 509 F.2d at 1096.

However, we do not feel that this carried beyond the basic habeas relief itself. We feel that as to the further relief of ordering expungement, the court should balance the equities and exercise discretion, which the district court apparently did not do. Accordingly, we vacate that portion of the judgment and remand for further proceedings on the request for expungement of the records.

Lastly, the State complains that the court erred in providing in the judgment that Stringfield's prior conviction was "vacated, quashed, set aside and held for naught, with prejudice." The "with prejudice" provision is challenged as error for barring the right to retry Stringfield. We must agree. While there are cases where a ruling in a habeas suit may bar further prosecution, we must agree that holding a conviction invalid and granting the writ do not generally bar retrial on the original charge. See Blackledge v. Perry, 417 U.S. 21, 31n.8.[13] Therefore, the provision that the conviction was set aside "with prejudice" must also be vacated. This judgment is therefore affirmed

[13]We do not, of course, intimate any view as to whether other rules of state law may be an impediment to a retrial.

in part, vacated in part as stated, and the case is remanded for further proceedings.

It is so ordered.

Nos. 75-1593, 75-1830, 75-1968, 76-1043, 76-1044 and 75-1988. HILL, Circuit Judge, dissents for the reasons stated by Judge Seth and Judge Barrett.

Nos. 75-1593—BROMLEY v. CRISP; 75-1830—GARNER v. OKLAHOMA; 75-1968—RUTLEDGE v. SUNDERLAND; 76-1043—KILLION & HANLEY v. FAULKNER; No. 76-1044—WILSON v. FAULKNER; 75-1988—STRINGFIELD v. GRIDER.

SETH, Circuit Judge, dissenting:

I must dissent from the majority, and adhere instead to the decision of the panel of this court in LAMB v. BROWN on the prospective application of that decision as a proper judicial determination.

Nos. 75-1593, 75-1830, 75-1968, 76-1043, 76-1044 and 75-1988.

BARRETT, Circuit Judge, dissenting:

I respectfully dissent. In my view we should re-adopt the statement contained in our ruling in Lamb v. Brown, 456 F.2d 18 (10th Cir. 1972), i.e., that the voiding of 10 Okl. St.Ann. § 1101 on constitutional grounds shall not be applied retroactively. I would apply the same ruling to other Oklahoma statutes challenged in these consolidated cases based upon Fourteenth Amendment Equal Protection grounds. The reasons therefor have been detailed in dissenting opinions filed by Judge Seth and this writer in Radcliff v. Anderson, 509 F.2d 1093 (10th Cir. 1974), *cert. denied*, 421 U.S. 939 (1975).

In my judgment, non-retroactive application is on "all fours" with the considerations determinative of retroactive versus prospective application of a new constitutional rul-

ing, i.e.: (a) the purpose to be served by the new rule; (b) the extent of reliance placed on the old rule; and (c) the effect on the administration of justice. In respect to the latter consideration, I believe that our *Radcliff* decision has created unjustified havoc and consequences upon the administration of Oklahoma's criminal laws spanning a period in excess of thirty years, notwithstanding that no challenges have ever been raised—nor are they before us now—involving the accuracy and fairness involved in the fact-finding processes, the procedural validity of the proceedings had, or the guilt of the male offenders.

APPENDIX "B"

FILED
JUN 30 1975
REX B. HAWKS
CLERK, U. S. DISTRICT COURT
By Zeta M. Cowan
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

LOUIS JAY BROMLEY, #87798, Petitioner,
v. No. CIV-75-0401-E
STATE OF OKLAHOMA, and JERRY SUNDERLAND, Warden, Respondent.

ORDER

This is another habeas case spawned by the decisions of the Court of Appeals in *Lamb* v. *Brown*, 456 F.2d 18 (CA 10 1972), and *Radcliff* v. *Anderson*, 509 F.2d 1093 (CA10 1975). It comes to this Court in this context. On June 28, 1972, the petitioner, who was then 16 years of age and represented by counsel, entered a plea of guilty to the charge of Assault and Battery with a Dangerous Weapon in Case No. CRF-71-2636, District Court of Oklahoma County, Oklahoma. He received a suspended sentence of three years. On March 12, 1974, the petitioner again appeared in the District Court of Oklahoma County with counsel and entered pleas of guilty in the following cases: CRF-74-403, Second Degree Burglary After Former Conviction of a Felony; CRF-74-404, Second Degree Burglary After Former Conviction of a Felony; and CRF-74-405, Robbery with Firearms After Former Conviction of a Felony. These recidivist convictions were premised upon his prior conviction

in said Case No. CRF-71-2636 and the petitioner received concurrent sentences of 22 years' imprisonment in each case. As a result of these latter convictions, the suspended sentence was also revoked in the former case. The petitioner is presently confined in the Oklahoma State Reformatory at Granite, Oklahoma.

The petitioner contends that his former conviction in said Case No. CRF-71-2636 was constitutionally void under *Lamb* and Radcliff and its use to enhance his punishment in said Cases No. CRF-74-403, CRF-74-404, and CRF-74-405 fatally tainted the proceedings in those cases.

On June 26, 1974, the petitioner filed an Application for Post-Conviction Relief in the District Court of Oklahoma County, which was denied on July 15, 1974. In Case No. PC-74-474, this Order was appealed to the Oklahoma Court of Criminal Appeals. On the 2nd day of August, 1974, the appellate court affirmed the denial of post-conviction relief. In these proceedings the same allegations contained in his petition in this court were presented to the Oklahoma court. The respondents concede that state remedies have been exhausted, but suggest that the Court of Criminal Appeals in the context of a direct appeal in another case had indicated its willingness to further consider the impact of *Lamb* and *Radcliff*. The respondents' conclusion that, therefore, the petitioner may have further state remedies available is questionable in the light of recent action by the Oklahoma Court of Criminal Appeals in other cases. See, e.g., *Dean* v. *Crisp*, 46 O.B.J. 1052, decided June 2, 1975. In any event the issues in this case have been fairly and squarely presented to the Oklahoma courts by this petitioner and it is recognized by respondents that no relief was afforded. Under the circumstances, no more is required. See *Picard* v. *Connor*, 404 U.S. 270 (1971).

Petitioner does not contend that his pleas of guilty in any of the cases were involuntary or that he was incompetently advised. He simply argues that by virtue of the

ruling of the 10th Circuit in *Lamb* and *Radcliff* his former conviction is constitutionally invalid and therefore his present detention is unlawful. We do not agree. In *Lamb*, decided March 16, 1972, the Court declared void as violative of the equal protection clause of the Fourteenth Amendment, 10 O.S.A. § 1101(a), enacted January 13, 1969, which provided in pertinent part:

> "The term 'child' means any male person under the age of 16 years and any female person under the age of 18 years."

Radcliff decided that the decision in *Lamb* should be applied retroactively. The constitutional violation to which the petitioner was subjected in the criminal proceedings culminating in his guilty plea in said Case No. CRF-71-2636 was the denial of benefits under the Oklahoma statute pertaining to juveniles which were available to females of the same age. He had no constitutional right as such to be treated as a juvenile. *Smith* v. *Yeager*, 459 F.2d 124 (CA3 1972). He did have a constitutional right under the Fourteenth Amendment to equal treatment. These benefits which were impermissibly denied to him include as pointed out in *Radcliff*, "form of petition (§ 1103), custody (§ 1104), release to parents (§ 1107), temporary detention (§ 1108), conduct of hearings, including a provision for privacy (§ 1111), and discretionary certification for adult proceedings after a preliminary hearing (§ 1112 (b).)" 509 F.2d at 1095. These procedural deprivations occurred prior to the petitioner's counseled plea of guilty. Such procedural rights under the State Juvenile Laws are analogous to the right of a preliminary examination in adult criminal proceedings under State law. There is no federal constitutional right to a preliminary hearing. *Ramirez* v. *Arizona*, 437 F.2d 119 (CA9 1971); *Collins* v. *Swenson*, 443 F.2d 329 (CA8 1971); *Pearce* v. *Cox*, 354 F.2d 884 (CA10 1965), cert. denied, 384 U.S. 976 (1966). If a preliminary hearing, however, is provided for under State law, it is then federally guaranteed

as a part of the due process of the State which must be afforded equally to all defendants. *Guerra* v. *Rodriguez*, 372 F.2d 472 (CA10 1967). An intelligent and voluntary plea of guilty nevertheless waives the absence of a preliminary hearing. *Pearce* v. *Cox*, supra. See also, *Cindle* v. *Page*, 452 F.2d 752 (CA10 1971) and *Guerra* v. *Rodriguez*, supra. So too, such a plea of guilty waives procedural infirmities of constitutional magnitude in juvenile proceedings. *Smith* v. *Yeager*, supra. See also, *Wilhite* v. *U.S.*, 281 F.2d 642 (CA D.C. 1960).

In *Brady* v. *United States*, 397 U.S. 742 (1970); *McMann* v. *Richardson*, 397 U.S. 759 (1970), and *Parker* v. *North Carolina*, 397 U.S. 790 (1970), the Supreme Court considered the effect of a plea of guilty on an assertion in a collateral proceeding of infringements of constitutional rights allegedly preceding the guilty plea and in each case concluded that it foreclosed a direct inquiry into the merits of the claimed antecedent constitutional violations. In *Tollett* v. *Henderson*, 411 U.S. 258 (1973), a State habeas petitioner sought relief on the basis that the systematic exclusion of Negroes from grand jury service rendered his conviction upon a counseled plea of guilty invalid. The Court said this was insufficient:

> "We hold that after a criminal defendant pleads guilty, on the advice of counsel, he is not automatically entitled to federal collateral relief on proof that the indicting grand jury was unconstitutionally selected. The focus of federal habeas inquiry is the nature of the advice and the voluntariness of the plea, not the existence as such of an antecedent constitutional infirmity." 411 U.S. at 266.

> "[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in McMann." 411 U.S. at 267.

The conclusion was not premised on a waiver rationale:

> "If the issue were to be cast solely in terms of 'waiver', the court of appeals was undoubtedly correct in concluding that there had been no such waiver here." 411 U.S. at 266.

The broad scope of the rule was explained by Justice White in his dissenting opinion in *Lefkowitz* v. *Newsome*, ... U.S. ... (Feb. 19, 1975):

> "Under *Tollett's* interpretation of the trilogy, and under *Tollett* itself, federal constitutional principles simply preclude the setting aside of a state conviction by a federal court where the defendant's guilt has been conclusively established by a voluntary and intelligent plea of guilty. Labels aside, a guilty plea for federal purposes is a judicial admission of guilt conclusively establishing a defendant's factual guilt."

The rule compels the conclusion here that the petitioner is not automatically entitled to habeas relief simply because he did not receive the same procedural rights afforded female juveniles. He is seeking to do precisely that which *Tollett* forbids. He asserts an independent claim of constitutional infirmity in the proceedings which preceded his decision to plead guilty.

It cannot be urged here as in *Backledge* v. *Perry*, 417 U.S. 21 (1974), that petitioner's claim goes "to very power of the State to bring the defendant into court to answer the charge brought against him." There can be no question

of the power of the District Court of Oklahoma County to try the petitioner even though he was only 16 years of age. The tainted proceedings could have been "cured" if the petitioner had been certified as an adult or otherwise treated the same as females.

The conclusive effect of petitioner's plea of guilty in said Case No. CRF-71-2636 becomes even more unassailable in the light of his later guilty pleas in said Cases No. CRF-74-403, CRF-74-404, and CRF-74-405. A plea of guilty has the effect of admitting all material facts alleged in the charge. *Kahl* v. *United States*, 204 F.2d 864 (CA10 1953). When the petitioner intelligently and voluntarily entered his pleas of guilty in said Cases No. CRF-74-403, CRF-74-404, and CRF-74-405, one of the elements of the offense which he admitted was the fact of a valid prior conviction. Therefore, it would not be accurate to say that the State used the previous Oklahoma County conviction to enhance the petitioner's punishment because no proof was required and none was introduced by the State. Further, the pleas of guilty in said Cases No. CRF-74-403, CRF-74-404 and CRF-74-405 constituted a waiver of all non-jurisdictional defenses. *United States* v. *Soltow*, 444 F.2d 509 (CA10 1971); *Adkins* v. *State of Kansas*, 386 F.2d 819 (CA10 1967); *Mahler* v. *United States*, 333 F.2d 472 (CA10 1964), cert. denied, 379 U.S. 993. In *Brady* v. *United States*, supra, the Supreme Court declared:

> "[T]he plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without trial . . ." 379 U.S. at 748.

Directly in point on this issue of the effect of a guilty plea to an enhancement charge is *Zales* v. *Henderson*, 433 F.2d 20 (CA5 1970), wherein the court persuasively reasons:

> "[1, 2] A guilty plea 'differs in purpose and effect from a mere admission or an extrajudicial confession;

> it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence.' Kercheval v. United States, 1927, 274 U.S. 220, 223, 47 S.Ct. 582, 583, 71 L.Ed. 1009, 1012. And in the leading exposition of this Court on the effect of a guilty plea, we stated:
>
> 'It is settled by a host of authorities that a judgment on a plea of guilty which has been entered voluntarily on advice of counsel is not rendered invalid because the defendant had previously made a confession under circumstances which might have rendered it inadmissible in evidence if the defendant had pleaded not guilty and had gone to trial. This is so because the plea, if voluntarily and understandingly made, is conclusive as to the defendant's guilt, admitting all the facts charged and waiving all non-jurisdictional defects in the prior proceedings against him. The judgment and sentence which follow a plea of guilty are based solely upon the plea. . . .'
>
> Busby v. Holman, 5 Cir., 1966, 356 F.2d 75, 77-78. Guided by *Busby* we have often enumerated the kinds of defects that a defendant waives when he pleads guilty. See, e.g., Brown v. Beto, 5 Cir., 1967, 377 F.2d 950 (illegal confession plus no counsel when it was taken); Hamilton v. Florida, 5 Cir., 1968, 390 F.2d 872 (illegal detainment, incompetent counsel, warrantless arrest); Askew v. Alabama, 5 Cir., 1968, 398 F.2d 825 (denial of the right to counsel and to confront witnesses at a preliminary hearing); White v. Beto, 5 Cir., 1968, 399 F.2d 302 (conviction based on insufficient evidence); Chandler, note 7, supra (denial of preliminary hearing); Todd v. United States, 5 Cir., 1969, 418 F.2d 134 (defense of insanity); Frye v. United States, 5 Cir., 1969, 411 F.2d 562 (alibi defense); Rice v. United States, 5 Cir., 1969, 420 F.2d 863 (denial of bail, wrong offense in indictment).

[3] Thus it is Zales' guilty plea at the habitual offender hearing that separates his case from *Burgett*. Zales waived any complaints he may have had concerning the former offenses which were set out in the enhancement charge. On the other hand, had the plea been not guilty, it would have put in issue all matters going to the validity of the prior convictions including the presence of counsel at the previous trial. If Zales had proved that no counsel had been present he then could have been possibly the first to argue the retroactivity of *Gideon*. Or Zales could have raised the *Burgett* question before Burgett did.

The information of the prosecutor clearly accused Zales of four felonies. His plea admitted those acts. He now seeks to show that his convictions for those acts are invalid for lack of counsel. But the Supreme Court has answered:

> 'We find no requirement in the Constitution that a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that the State would have had a weaker case than the defendant had thought. . .'
>
> *Brady*, supra, 397 U.S. at 757, 90 S.Ct. at 1474." (Footnotes omitted) 433 F.2d at 23 and 24.

A court is not required to consider a petitioner's challenge to his former convictions if he has voluntarily and knowingly plead guilty to the enhancement charge. *Price* v. *Beto*, 436 F.2d 1070 (CA5 1971).

Accordingly since the files and records examined by the Court conclusively show the petitioner is not entitled to relief and there are no material issues of fact which require an evidentiary hearing, the Petition for Writ of Habeas Corpus will be denied.

IT IS SO ORDERED.

Dated this 30th day of June, 1975.

s Luther B. Eubanks
UNITED STATES DISTRICT JUDGE

ENTERED IN JUDGMENT DOCKET ON JULY 30, 1975

ADELAIDE HOLSTON, DEPUTY

APPENDIX "C"

FILED
OCT 21 1975
REX B. HAWKS
CLERK, U. S. DISTRICT COURT
By Zeta M. Cowan
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

GARY MICHAEL RUTLEDGE.
Petitioner,

v.) No. CIV-75-0556-E

JERRY SUNDERLAND, Warden,
Oklahoma State Reformatory,
Respondent.

ORDER

The petitioner, Gary Michael Rutledge, a prisoner in the Oklahoma State Reformatory at Granite, Oklahoma, has submitted to this court his Petition for Writ of Habeas Corpus challenging his detention by virtue of the judgment and sentence of the District Court of Beckham County, Oklahoma, in Case No. CRF-73-81. The respondent has filed a Response by and through the Attorney General of the State of Oklahoma and submitted in support thereof the original record and transcript of petitioner's trial.

The petitioner alleges that his conviction is constitutionally invalid because:

> "2. Petitioner was denied equal protection of the laws under the Fourteenth Amendment of the United States Constitution in that the former convictions relied upon to enhance punishment in the present case, and which were also used to impeach Petitioner's testimony, were committed when Petitioner was 16 years

of age; guilty pleas were entered by the Petitioner on January 8, 1971, when he was 17 years of age, and that under 10 O.S. 1101, a female of the same age could not have been convicted of the same offenses as those for which Petitioner was convicted.

3. Petitioner was further denied his right to a speedy trial and due process as guaranteed by the United States Constitution in that the crime with which he was charged was allegedly committed on January 24, 1973, in the presence of ARTHUR LINVILLE, an agent of the Oklahoma State Bureau of Investigation, but the Defendant was not arrested on on the charge until October 10, 1973, 259 days or over eight and one-half months later.

4. Petitioner was further denied his right to due process under the Constitution of the United States in that the former convictions relied upon to enhance punishment in this case were not introduced at trial; the prosecutor further did not show that Petitioner was represented by counsel or had properly waived counsel on entering the pleas, and did not show that the pleas of guilty of the Petitioner on the former convictions were knowingly and intelligently entered."

From the court's examination of the records it appears that the petitioner was convicted in said Case No. CRF-73-81 after a trial by jury in a two-stage proceeding of the offense of Distribution of a Controlled Dangerous Substance L.S.D. After Former Conviction of a Felony. In accordance with the verdict of the jury he was sentenced on January 25, 1974, to a term of 10 years imprisonment. A direct appeal was perfected to the Oklahoma Court of Criminal Appeals in which the petitioner presented his equal protection and speedy trial claims. On October 29, 1974, the appeals court affirmed the judgment and sentence. *Rutledge* v. *State*, 527 P.2d 1373. The petitioner thereafter filed an application for post conviction relief in the District Court of Beckham

County on substantially the same grounds presented in his petition herein. The District Court denied relief without an evidentiary hearing on January 14, 1975. There was no appeal from this order.

The respondent asserts that the petitioner has not exhausted his state remedies since he did not specifically allege in his post conviction application that the former convictions used to impeach and enhance punishment were constitutionally invalid because obtained in violation of the Equal Protection Clause and he did not appeal the denial of his post conviction relief. The respondent does concede that the equal protection claim was squarely presented on direct appeal. Although the allegations in the post conviction application do not specifically refer to the Equal Protection Clause the facts alleged leave no doubt as to the basis for the claim. Moreover, since both the equal protection and speedy trial issues were decided on direct appeal the petitioner was not required to appeal to the Court of Criminal Appeals from the denial of post conviction relief in order to exhaust his state remedies on these grounds. *Cochran* v. *Rodriguez*, 438 F.2d 926 (CA10 1971). It is true that the petitioner's contention concerning the sufficiency of the proof as to his former convictions in the second stage of the trial was not included in the direct appeal. However, we cannot conclude on the record before us that the failure of the petitioner to appeal on this ground constituted a deliberate bypass. The order did not advise the petitioner of his right to appeal. The order was entered January 14, 1975, and this cause was not commenced until July 9, 1975, almost five months after the time for appeal had expired. The test for "deliberate bypass" includes an awareness of availability of the state remedy and a decision not to use it made by the petitioner himself. *Watkins* v. *Crouse*, 344 F.2d 927 (CA10 1965). Cf. *Kanan* v. *Denver District Court*, 438 F.2d 521 (CA10 1971) where the petitioner was informed of the proper procedure before the time for appeal had expired.

The facts which give rise to petitioner's first proposition are not in dispute. On January 8, 1971, the petitioner, who was then 17 years of age and represented by counsel, entered a plea of guilty to the charge of grand larceny in Case No. CRF-70-66, District Court of Beckham County and likewise entered a plea of guilty in another charge of grand larceny in Case No. CRF-70-67. He received concurrent sentences of two and one-half years in each case. In the first stage of his trial in Case No. CRF-73-81 the petitioner took the stand and admitted these two former convictions and that he had plead guilty in each case. In the punishment phase of the trial the court relied upon these prior admissions to establish the former convictions for enhancement purposes.

The petitioner does not contend that his pleas of guilty were involuntary or that he was incompetently advised. In apparent reliance upon *Lamb* v. *Brown*, 456 F.2d 18 (CA 10 1972) and *Radcliff* v. *Anderson*, 509 F.2d 1093 (CA10 1975) he simply concludes that such convictions were constitutionally invalid because he was only 17 at the time and a female of the same age could not then under the Oklahoma law have been convicted of the same offenses. The petitioner assumes too much. In *Lamb*, decided March 16, 1972, the Court declared void as violative of the equal protection clause of the Fourteenth Amendment, 10 O.S.A. § 1101(a), enacted January 13, 1969, which provided in pertinent part:

> "The term 'child' means any male person under the age of 16 years and any female person under the age of 18 years."

Radcliff decided that the decision in *Lamb* should be applied retroactively. The constitutional violation to which the petitioner was subjected in the criminal proceedings culminating in his guilty pleas in said Cases No. CRF-70-66 and CRF-70-67 was the denial of benefits under the Oklahoma statute

pertaining to juveniles which were available to females of the same age. He had no constitutional right as such to be treated as a juvenile. *Smith* v. *Yeager*, 459 F.2d 124 (CA3 1972). He did have a constitutional right under the Fourteenth Amendment to equal treatment. These benefits which were impermissibly denied to him include as pointed out in *Radcliff*, "form of petition (§ 1103), custody (§ 1104), release to parents (§ 1107), temporary detention (§ 1108), conduct of hearings, including a provision for privacy (§ 1111), and discretionary certification for adult proceedings after a preliminary hearing (§ 1112(b))." 509 F.2d at 1095. These procedural deprivations occurred prior to the petitioner's counseled pleas of guilty. Such procedural rights under the State Juvenile Laws are analogous to the right of a preliminary examination in adult criminal proceedings under the State law. There is no federal constitutional right to a preliminary hearing. *Ramirez* v. *Arizona*, 437 F.2d 119 (CA9 1971); *Collins* v. *Swenson*, 443 F.2d 329 (CA8 1971); *Pearce* v. *Cox*, 354 F.2d 884 (CA10 1965), cert. denied, 384 U.S. 976 (1966). If a preliminary hearing, however, is provided for under State law, it is then federally guaranteed as a part of the due process of the State which must be afforded equally to all defendants. *Guerra* v. *Rodriguez*, 372 F.2d 472 (CA10 1967). An intelligent and voluntary plea of guilty nevertheless waives the absence of a preliminary hearing. *Pearce* v. *Cox*, supra. See also, *Cindle* v. *Page*, 452 F.2d 752 (CA10 1971) and Guerra v. Rodriguez, supra. So too, such a plea of guilty waives procedural infirmities of constitutional magnitude in juvenile proceedings. *Claunch* v. *Page*, 427 F.2d 841 (CA10 1970); *Acuna* v. *Baker*, 418 F.2d 639 (CA10 1969); *Salazar* v. *Rodriguez*, 371 F.2d 726 (CA10 1967). *Smith* v. *Yeager*, supra. See also *Wilhite* v. *United States*, 281 F.2d 642 (CA D.C. 1960).

In *Brady* v. *United States*, 397 U.S. 742 (1970); *McMann* v. *Richardson*, 397 U.S. 759 (1970); and *Parker* v. *North Carolina*, 397 U.S. 790 (1970), the Supreme Court considered the effect of a plea of guilty on an assertion in

a collateral proceeding of infringements of constitutional rights allegedly preceding the guilty plea and in each case concluded that it foreclosed a direct inquiry into the merits of the claimed antecedent constitutional violations. In *Tollett* v. *Henderson*, 411 U.S. 258 (1973), a State habeas petitioner sought relief on the basis that the systematic exclusion of Negroes from grand jury service rendered his conviction upon a counseled plea of guilty invalid. The court said this was insufficient:

> "We hold that after a criminal defendant pleads guilty, on the advice of counsel, he is not automatically entitled to federal collateral relief on proof that the indicting grand jury was unconstitutionally selected. The focus of federal habeas inquiry is the nature of the advice and the voluntariness of the plea, not the existence as such of an antecedent constitutional infirmity." 411 U.S. at 266.
>
> "[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in McMann." 411 U.S. at 267.

The conclusion was not premised on a waiver rationale:

> "If the issue were to be cast solely in terms of 'waiver', the court of appeals was undoubtedly correct in concluding that there had been no such waiver here." 411 U.S. at 266.

The broad scope of the rule was explained by Justice White in his dissenting opinion in *Lefkowitz* v. *Newsome*, 420 U.S. 283, 299 (1975):

> "Under *Tollett's* interpretation of the trilogy, and under *Tollett* itself, federal constitutional principles simply preclude the setting aside of a state conviction by a federal court where the defendant's guilt has been conclusively established by a voluntary and intelligent plea of guilty. Labels aside, a guilty plea for federal purposes is a judicial admission of guilt conclusively establishing a defendant's factual guilt."

The rule compels the conclusion here that the petitioner is not automatically entitled to habeas relief simply because he did not receive the same procedural rights afforded female juveniles. He is seeking to do precisely that which *Tollett* forbids. He asserts an independent claim of constitutional infirmity in the proceedings which preceded his decision to plead guilty.

It cannot be urged here as in *Blackledge* v. *Perry*, 417 U.S. 21 (1974), that petitioner's claim goes "to very power of the State to bring the defendant into court to answer the charge brought against him." There can be no question of the power of the District Court of Beckham County to try the petitioner even though he was only 17 years of age. The tainted proceedings could have been "cured" if the petitioner had been certified as an adult or otherwise treated the same as females.

We conclude, therefore, that petitioner's former convictions were not constitutionally invalid.

The petitioner's speedy trial complaint is without merit. The offense was committed on January 24, 1973. The prosecution was not commenced until the preliminary information was filed on October 10, 1973. He objects to the eight and one-half months delay between the date of the offense and his arrest on October 10th. He does not claim

that the Sixth Amendment was violated by the three month delay between his arrest and trial. The challenged period is not subject to speedy trial requirements. As pointed out in *United States* v. *Marion*, 404 U.S. 307, 320 (1971):

> "[I]t is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engages the particular protections of speedy trial provisions of the Sixth Amendment."

There are no allegations establishing substantial prejudice to petitioner's right to a fair trial or that the delay was a purposeful device by the prosecution to gain tactical advantage over petitioner so as to violate the Due Process Clause of the Fifth Amendment.

The final contention of the petitioner concerning the proof of convictions to enhance punishment does not raise a federal constitutional question. He does not deny the convictions and does not allege that the convictions themselves were constitutionally infirm by reason of denial of counsel. Cf. *United States* v. *Tucker*, 404 U.S. 443 (1972) and *Burgett* v. *Texas*, 389 U.S. 109 (1967). He objects only on the basis that copies of the convictions were not introduced at trial and the prosecution did not affirmatively show that the petitioner was represented by counsel or that his pleas were knowingly and intelligently entered. No objections were made in the second stage of trial to the action by the court in treating petitioner's admissions in the first stage as adequate proof to enhance punishment. The constitutional vice is the use of constitutionally invalid convictions. The obvious reason that the petitioner does not attack the convictions themselves but limits his challenge to the procedure followed is that, as shown by certified copies of the judgments in each case attached to the Response, petitioner was, in fact, represented by counsel. The federal Constitution does not prescribe the manner in which constitutionally unassailable convictions may be proved or utilized to enhance punishment. Once the issue of guilt of the accused has been determined the proper procedure to invoke the application of the Enhancement Statute is a matter of Oklahoma law and is properly for the determination of State courts. A federal court must accept their interpretation of the State law unless they are inconsistent with the fundamental principles of liberty and justice. *Goldsmith* v. *Cheney*, 447 F.2d 624 (CA10 1971); *Francia* v. *Rodriguez*, 371 F.2d 827 (CA10 1961); *Ratley* v. *Crouse*, 361 F.2d 320 (CA10 1966) and *Mesmer* v. *Raines*, 298 F.2d 718 (CA10 1961). No such showing is made here.

Since the application together with the files and records examined by the court conclusively show the petitioner is entitled to no relief and there are no material issues of fact an evidentiary hearing is not required. *Boyd* v. *State of Oklahoma*, 375 F.2d 481 (CA10 1967).

Accordingly, the Petition for Writ of Habeas Corpus will be denied.

IT IS SO ORDERED.

Dated this 21st day of October, 1975.

s/ Luther B. Eubanks
LUTHER B. EUBANKS
UNITED STATES DISTRICT JUDGE

ENTERED IN JUDGMENT DOCKET ON OCT. 21, 1975
By: _____

APPENDIX "D"

FILED
DEC 22 1975
JACK C. SILVER, CLERK
U. S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

BILLIE JAY KILLION and DELMAR EUGENE HANLEY, Petitioners,	)	
vs.	)	No. 75-C-220
DAVE FAULKNER, Sheriff, Tulsa County, State of Oklahoma, et al., Respondent.	)	

ORDER

The Court has for consideration the petition for writs of habeas corpus pursuant to 28 U.S.C. § 2241, *et seq.*, of Billie Jay Killion and Delmar Eugene Hanley. Having examined the file, heard the argument of counsel and had the benefit of copius briefs of the parties, the Court, being fully advised in the premises, finds that:

1. Billie Jay Killion was born January 3, 1942, and at age seventeen was convicted following a plea of not guilty of the offense, under the laws of the State of Oklahoma, of murder. He was sentenced on September 24, 1959, to life imprisonment on said conviction.

2. Delmar Eugene Hanley was born January 26, 1952, and at age sixteen was convicted following his pleas of guilty of the offenses under the laws of the State of Oklahoma of second degree rape, second degree rape, and robbery with firearms. He was sentenced on September 6, 1968, to respective terms of imprisonment for fifteen years, fifteen years, and twenty years, on the convictions.

3. Petitioners Killion and Hanley remain in custody in the State of Oklahoma as the result of their convictions and sentences set forth above. Their State remedies effectively exhausted, they seek release by Order of this Court on the ground that their constitutional rights to equal protection of the law were violated in that they were prosecuted and sentenced as adult offenders and not as juveniles when women for like crimes would have been treated as juveniles because of a disparity in the age classification between 16-18 year old males and 16-18 year old females under 10 O.S.A. § 1101 (Supp. 1969).

4. In *Lamb* v. *Brown*, 465 F.2d 18 (10th Cir. 1972), it was held that 10 O.S.A. § 1101 (Supp. 1969) was violative of the equal protection clause of the Constitution of the United States of America because of the disparity therein in the age classification between 16-18 year old males and 16-18 year old females. The appellate Court in *Lamb*, at p. 19, recognized the principle that "wide discretion is vested in a state's legislative body relating to the establishment of reasonable classifications for purposes of promoting the health, safety and welfare of those within its jurisdiction." This discretionary power is recognized, secured and protected by the Tenth Amendment to the Constitution of the United States.

The appellate Court in *Radcliff* v. *Anderson*, 509 F.2d 1093 (10th Cir. 1974), where it dealt only with the retroactivity of *Lamb*, reaffirmed the unconstitutionality of 10 O.S.A. § 1101 (Supp. 1969), and in applying *Lamb* retroactively the Circuit Court reiterated that the purpose of *Lamb* "was to end sex discrimination in juvenile proceedings." *Lamb* and *Radcliff* are the settled law.

4. The State of Oklahoma has recognized that 10 O.S.A. § 1101 (Supp. 1969) was unconstitutional and the extent and retroactive application of the *Lamb* and *Radcliff* decisions. The State Legislature, subsequent to the *Lamb* decision, has enacted a new law which includes no differentiation between the sexes in regard to the ages of persons qualifying for such proceedings. 10 O.S.A. § 1101(a), Eff. April 4, 1972. Further, the Courts of the State of Oklahoma in proceedings following the *Lamb* and *Radcliff* decisions have met and exceeded the minimum established in *Radcliff* where "The reliance on § 1101 was confined to the period between January 13, 1969, its effective date (see statement preceding § 1101 in 1 O.S. 1971), and the March 16, 1972, decision in Lamb." *See Radcliff, infra*, p. 1095. The State Courts have held in *Schaffer* v. *Green*, Okl. Cr., 496 P.2d 375 (1972), that to fill the legislative void created by *Lamb* until the House and Senate of the Oklahoma State Legislature had acted, it became the responsibility of the Courts to determine if there were effective legislation defining the age and classifications of persons responsible and not responsible for criminal acts as adults within the constitutional requirements of the Fourteenth Amendment. It was the Court's determination that 21 O.S. § 152, originally enacted in 1910 and in conformity with the common law tradition, never having been expressly repealed, was then still effective; and that law defined the jurisdiction of the Courts of Oklahoma with respect to criminal capacity as being anyone over the age of seven but under the age of fourteen where there is showing such persons knew the wrongfulness of the act, and all persons over the age of fourteen.

5. The Federal Courts are generally bound by the interpretation of the highest Court of the State regarding jurisdictional questions. *See Anderson* v. *Gladden*, 293 F.2d 463, 467 (9th Cir. 1961). The Tenth Circuit follows this rule. *Francia* v. *Rodriguez*, 371 F.2d 827 (10th Cir. 1967), *Mesmer* v. *Raines*, 298 F.2d 718 (10th Cir. 1961).

6. The *Lamb* and *Radcliff* decisions are being followed by the State Courts of Oklahoma, and the unconstitutional provisions of Oklahoma law dealt with in said decisions have been eliminated. Further, the high Court of the State

of Oklahoma, in defining the criminal jurisdiction of Oklahoma Courts has determined that between 1910 and March 16, 1972, persons accused of crime who were over the age of seven and under the age of fourteen in whose cases there was showing that the accused knew the wrongfulness of the alleged criminal act, and all persons over the age of fourteen, were the proper objects of criminal prosecution in the Oklahoma State Courts. This Court deems that holding of the high Court of the State of Oklahoma in regarding this jurisdictional question binding upon this Court, and although the lengthy and involved arguments of the parties have been carefully studied and weighed, the Court finds that the State Court's interpretation of its jurisdiction in such matters does not offend the basic principles of fairness and justice so as to require the relief prayed herein. The petition for writs of habeas corpus of Billie Jay Killion and Delmar Eugene Hanley should be denied.

IT IS, THEREFORE, ORDERED that the petition for writs of habeas corpus of Billie Jay Killion and Delmar Eugene Hanley be and it is hereby denied and the case is dismissed.

Dated this 22nd day of December, 1975, at Tulsa, Oklahoma.

s/ Allen E. Barrows

CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

APPENDIX "E"

FILED
SEP 8 1975
REX B. HAWKS
CLERK U. S. DISTRICT COURT
By Zeta M. Cowan
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

DAVID LEE GARNER, Petitioner,
-vs-
THE STATE OF OKLAHOMA, Respondent.
No. CIV-74-336-E

ORDER

On the 29th day of August, 1975, this cause came on for evidentiary hearing. Petitioner appeared in person and with his private attorney, Fred Gilbert. Kay Karen Kennedy, Assistant Attorney General for the State of Oklahoma, appeared for the respondent. Pursuant to this Court's *Memorandum and Order* issued on August 15, 1975, said evidentiary hearing was conducted to determine if the petitioner was improperly prejudiced by the failure of the state court to accord to him the same benefits which a 17 year old female would have received in like circumstances.

On the evidence presented to the Court, the following findings of fact, are made herein:

1. Petitioner's date of birth was May 25, 1954.

2. Petitioner was 17 years of age when the crime, as charged in CRF-71-1518, was committed.

3. At the age of 15 years, petitioner was referred to the Juvenile Division of the Oklahoma County District Court. After a hearing by that court, petitioner was adjudi-

cated a juvenile delinquent. Petitioner was placed on probation from August, 1969 to January, 1970. Due to further criminal misconduct, petitioner was incarcerated in a state training school.

4. On January 22, 1971, petitioner pled guilty to the criminal charge of Forgery in the Second Degree. Petitioner, then 16 years of age, was given a deferred sentence. The deferred sentence was accelerated on February 21, 1972; plaintiff received a two year sentence.

5. In January, 1972, petitioner was tried on the charge of Robbery with Firearms in Case No. CRF-71-1518. Petitioner was convicted and sentenced to a term of 18 years imprisonment.

6. Concurrent to the charge filed in CRF-71-1518, petitioner was charged in Cases No. CRF-71-1515 and CRF-71-1520 with the crime of Robbery with Firearms. Subsequent to the conviction in case No. CRF-71-1518, petitioner entered pleas of guilty in CRF-71-1515 and CRF-71-1520 to the included offense of Concealing Stolen Property. Petitioner received two two year terms of imprisonment, the sentences to run concurrently.

7. The only testimony petitioner gave at the evidentiary hearing was his name and date of birth. Upon the advice of his attorney, petitioner refused to answer questions and stated that he wished to invoke his Fifth Amendment rights. Petitioner failed to offer any evidence which would have established that he was improperly prejudiced by the failure to be certified as an adult. Petitioner also failed to show that he had been harmed by the failure of the State to extend to him the benefits that a female the same age would have received. Therefore, petitioner's evidence fell far short of a showing that he was entitled to release from custody.

8. After a careful review of the facts and circumstances of this case, this Court has no difficulty in finding

to a moral and legal certainty that no Juvenile Court, on the record in this case, would have denied transfer. The petitioner, in proceedings before the Juvenile Court conducted prior to the filing of the 1970 charge, had been adjudicated a juvenile delinquent and incarcerated in a detention home. Petitioner was afforded several opportunities to take advantage of the rehabilitative programs afforded juvenile offenders. However, petitioner, with full knowledge of the consequences of his acts, continued to violate the penal laws of the State of Oklahoma.

9. This Court concludes that such circumstances made transfer inevitable when petitioner was subsequently charged with Robbery with Firearms. The gravity of the offense was such that it would be unreasonable to assume that any court would have denied transfer. It should also be noted that the crime was not an isolated incident, but one of several similar crimes committed by the petitioner.

10. Based upon the record in this case, the Court finds that there is no reasonable doubt that certification would have been granted and the adult conviction obtained.

THEREFORE, IT IS BY THE COURT ORDERED THAT petitioner's writ of habeas corpus be denied.

s/ Luther B. Eubanks
LUTHER B. EUBANKS
UNITED STATES DISTRICT JUDGE

ENTERED IN JUDGMENT DOCKET ON SEPT. 8, 1975
By: _____

APPENDIX "F"

FILED
DEC 22 1975
JACK C. SILVER, CLERK
U. S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

DEREK LEE WILSON,
Petitioner,
vs.) No. 75-C-227
DAVE FAULKNER, Sheriff, Tulsa County, State of Oklahoma, et al.,
Respondent.

ORDER

The Court has for consideration the petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2241, *et seq.*, of Derek Lee Wilson. Having examined the file, heard the argument of counsel and had the benefit of copious briefs of the parties, the Court, being fully advised in the premises, finds that:

1. Derek Lee Wilson was born September 24, 1953, and at age seventeen was convicted following his pleas of guilty of the offenses under the laws of the State of Oklahoma of possession of narcotics, obtaining property by false pretenses, robbery with firearms, second degree burglary, and robbery with firearms. He was sentenced on November 10, 1970, to respective terms of imprisonment for seven years, three years, twenty-five years, five years, and twenty-five years, on the convictions.

2. Petitioner Wilson remains in custody in the State of Oklahoma as the result of said convictions and sentences, and State remedies effectively exhausted he seeks release by Order of this Court on the ground that his constitutional

right to equal protection of the law was violated in said proceedings in that he was prosecuted and sentenced as an adult offender and not as a juvenile when a woman for like crimes would have been treated as a juvenile because of a disparity in the age classification between 16-18 year old males and 16-18 year old females under 10 O.S.A. § 1101 (Supp. 1969).

3. In *Lamb* v. *Brown*, 456 F.2d 18 (10th Cir. 1972), it was held that 10 O.S.A. § 1101 (Supp. 1969) was violative of the equal protection clause of the Constitution of the United States of America because of the disparity therein in the age classification between 16-18 year old males and 16-18 year old females. The appellate Court in *Lamb*, at p. 19, recognized the principle that "wide discretion is vested in a state's legislative body relating to the establishment of reasonable classifications for purposes of promoting the health, safety and welfare of those within its jurisdiction." This discretionary power is recognized, secured and protected by the Tenth Amendment to the Constitution of the United States.

The appellate Court in *Radcliff* v. *Anderson*, 509 F.2d 1093 (10th Cir. 1974), where it dealt only with the retroactivity of *Lamb*, reaffirmed the unconstitutionality of 10 O.S.A. § 1101 (Supp. 1969), and in applying *Lamb* retroactively the Circuit Court reiterated that the purpose of *Lamb* "was to end sex discrimination in juvenile proceedings." *Lamb* and *Radcliff* are the settled law.

4. The State of Oklahoma has recognized that 10 O.S.A. § 1101 (Supp. 1969) was unconstitutional and the extent and retroactive application of the *Lamb* and *Radcliff* decisions. The State Legislature, subsequent to the *Lamb* decision, has enacted a new law which includes no differentiation between the sexes in regard to the ages of persons qualifying for such proceedings. 10 O.S.A. § 1101(a), Eff. April 4, 1972. Further, the Courts of the State of Oklahoma in proceedings following the *Lamb* and *Radcliff* decisions

have met and exceeded the minimum established in *Radcliff* where "The reliance on § 1101 was confined to the period between January 13, 1969, its effective date (see statement preceding § 1101 in 1 O.S. 1971), and the March 16, 1972, decision in Lamb." *See Radcliff, infra*, p. 1095. The State Courts have held in *Schaffer* v. *Green*, Okl. Cr., 496 P.2d 375 (1972), that to fill the legislative void created by *Lamb* until the House and Senate of the Oklahoma State Legislature had acted. it became the responsibility of the Courts to determine if there were effective legislation defining the age and classifications of persons responsible and not responsible for criminal acts as adults within the constitutional requirements of the Fourteenth Amendment. It was the Court's determination that 21 O.S. § 152, originally enacted in 1910 and in conformity with the common law tradition, never having been expressly repealed, was then still effective; and that law defined the jurisdiction of the Courts of Oklahoma with respect to criminal capacity as being anyone over the age of seven but under the age of fourteen where there is showing such persons knew the wrongfulness of the act, and all persons over the age of fourteen.

5. The Federal Courts are generally bound by the interpretation of the highest Court of the State regarding jurisdictional questions. *See Anderson* v. *Gladden*, 293 F.2d 463, 467 (9th Cir. 1961). The Tenth Circuit follows this rule. *Francia* v. *Rodriguez*, 371 F.2d 827 (10th Cir. 1967), *Mesmer* v. *Raines*, 298 F.2d 718 (10th Cir. 1961).

6. The *Lamb* and *Radcliff* decisions are being followed by the State Courts of Oklahoma, and the unconstitutional provisions of Oklahoma law dealt with in said decisions have been eliminated. Further, the high Court of the State of Oklahoma, in defining the criminal jurisdiction of Oklahoma Courts has determined that between 1910 and March 16, 1972, persons accused of crime who were over the age of seven and under the age of fourteen in whose cases there

was showing that the accused knew the wrongfulness of the alleged criminal act, and all persons over the age of fourteen, were the proper objects of criminal prosecution in the Oklahoma State Courts. This Court deems that holding of the high Court of the State of Oklahoma regarding this jurisdictional question binding upon this Court, and although the lengthy and involved arguments of the parties have been carefully studied and weighed, the Court finds that the State Court's interpretation of its jurisdiction in such matters does not offend the basic principles of fairness and justice so as to require the relief prayed herein. The petition for writ of habeas corpus of Derek Lee Wilson should be denied.

IT IS, THEREFORE, ORDERED that the petition for writ of habeas corpus of Derek Lee Wilson be and it is hereby denied and the case is dismissed.

Dated this 22nd day of December, 1975, at Tulsa, Oklahoma.

s/ Allen E. Barrows
CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

APPENDIX "G"

JANUARY TERM — February 4, 1976

Before Honorable David T. Lewis, Chief Judge

LOUIS JAY BROMLEY,	)	No. 75-1593
DAVID LEE GARNER,	)	No. 75-1830
Plaintiffs-Appellants,	)	
vs.	)	
STATE OF OKLAHOMA,	)	
Respondent-Appellee.	)	
BILLIE JAY KILLION and	)	
DELMAR EUGENE HANLEY,	)	No. 76-1043
DEREK LEE WILSON,	)	No. 76-1044
Petitioners-Appellants,	)	
vs.	)	
DAVE FAULKNER, Sheriff,	)	
Tulsa County, State of Oklahoma,	)	
Respondent-Appellee.	)	
GARY MICHAEL RUTLEDGE,	)	No. 75-1968
Petitioner-Appellant,	)	
WILLIAM LYNN STRINGFIELD,	)	No. 75-1988
Petitioner-Appellee,	)	
vs.	)	
JERRY SUNDERLAND, Warden,	)	
Oklahoma State Reformatory, et al.	)	
Respondents-Appellants,	)	
in Case No. 75-1988,	)	
Respondents-Appellee	)	
in Case No. 75-1968.	)	

The Court, upon its own motion, has for consideration the matter of the expeditious preparation and presentation of these appeals which involve issues sufficiently related to warrant companioning for the purposes of economy in briefing, oral argument and perhaps record preparation. The Court notes that some of the cases need calendar assignment, some need a change of calendar assignment and some need the appointment of counsel for the indigent appellants.

Upon consideration whereof, it is the order of the Court as follows:

1) The calendar assignment of appeal No. 75-1593, Bromley v. State of Oklahoma and of appeal No. 75-1830, Garner v. State of Oklahoma, are changed from Calendar D to Calendar B.

2) Appeal No. 76-1043, Killion and Hanley v. Dave Faulkner, Sheriff, and appeal No. 76-1044, Wilson v. Dave Faulkner, Sheriff, are assigned to Calendar B.

3) Appeal No. 75-1968, Rutledge v. Jerry Sunderland, Warden and appeal No. 75-1988, Stringfield v. Jerry Sunderland, Warden, shall remain assigned to Calendar B.

4) The six cases are companioned and, at the convenience of counsel, may be briefed individually or in combinations so as to allow the presentation of the common issues without repetition and the individual issues separately in a single brief bearing all or a portion of the numbers as counsel elects.

5) There being no present attorney appointed by this Court to represent the appellant Bromley in appeal No. 75-1593, Bromley v. State of Oklahoma and appellant Garner in appeal No. 75-1830, Garner v. State of Oklahoma, it is the order of the Court that Fred Gilbert, Esquire, is appointed to represent the appellants in these cases. The clerk shall furnish Mr. Gilbert with a voucher Form CJA evidencing his appointment.

6) The captioned cases shall be placed on the calendar for oral argument and submission as soon as the principle briefs have been filed.

s/ Howard K. Phillips

HOWARD K. PHILLIPS
Clerk

APPENDIX "H"

FILED
In Court of Criminal Appeals
of the State of Oklahoma
JUN 10 1975
ROSS N. LILLARD, JR.
CLERK

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel., S. M. FALLIS, JR., DISTRICT ATTORNEY OF TULSA COUNTY, OKLAHOMA, Petitioner,	)	
-vs-	)	No. O-75-246
HONORABLE MARGARET LAMM, DISTRICT JUDGE, TULSA COUNTY, OKLAHOMA, Respondent.	)	

ORDER ASSUMING ORIGINAL JURISDICTION, DENYING MOTION TO DISMISS BUT ISSUING WRIT OF MANDAMUS

On the 28th day of May, 1975, there came on for hearing pursuant to setting Petitioner's application to assume original jurisdiction and for writ of mandamus, the parties appearing as follows: Petitioner by Marvin Spears; the defendant, Derek Lee Wilson, in the lower court appearing by and through his attorney, Mr. Fred Gilbert; and the said Respondent not appearing in any manner, although duly notified by this Court.

The Court, after hearing statements and arguments of counsel and being fully advised in the premises, finds:

THAT this Court should and does hereby assume original jurisdiction herein and proceeds to hear and dispose of the petition for writ of mandamus as follows:

THAT in the District Court of Tulsa County, Derek Lee Wilson, hereinafter referred to as defendant, was charged in Case No. CRF-70-1327 with Burglary, Second Degree; Case No. CRF-70-1560 with Obtaining Property by False Pretense; Case No. CRF-70-1910 with Robbery with Firearms; Case No. CRF-70-1915 with Possession of Narcotic Drug; and Case No. CRF-70-2012 with Robbery with Firearms, whereafter he entered a plea of guilty in each case and was sentenced to serve a term of seven (7) years, three (3) years, twenty-five (25) years, five (5) years, and twenty-five (25) years, respectively, with sentences to run concurrently. Subsequently on the 1st day of May, 1975, the defendant filed a second application for post conviction relief. Whereafter on the 9th day of May, 1975, the Respondent granted the defendant relief but stayed the execution of said order until the 3rd day of June, 1975. The District Court's order also provided the defendant bail in the nature of his own recognizance to his attorney and to his mother. Petitioner now seeks mandamus relief.

The Petitioner asserts the trial court erred in releasing the defendant to bail while staying the execution of the judgment and sentence.

This Court directs the Respondent's attention to Rule 4.1(C) of the Rules of this Court wherein it states:

> "*Bail Not Allowed.* No applicant for Post-Conviction Relief filed under the provisions of 22 O.S. 1971, § 1080 et seq. shall be entitled to bail by the trial court or the Court of Criminal Appeals pending the hearing of said Application, nor shall the provisions of 22 O.S. 1971, § 1080, be construed to vest the trial court with the authority to set bail."

We, therefore, find Judge Margaret Lamm was without authority to grant the defendant bail during the pendency of the appeal of the lower court's order granting post conviction relief to defendant.

The State of Oklahoma further asserts the trial court erred in finding that *Lamb* v. *Brown*, 456 F.2d 18 (10th Cir., 1972) and *Radcliff* v. *Anderson*, 509 F.2d 1093 (10th Cir., 1975) are the law of the State of Oklahoma thus rejecting *Schaffer* v. *Green*, Okl.Cr., 496 P.2d 375 and *Freshour* v. *Turner*, Okl.Cr., 496 P.2d 389. The defendant contends, to which the lower court agrees, that his convictions in Case Nos. CRF-70-1327, CRF-70-1560, CRF-70-1910, CRF-70-1915 and CRF-70-2012 should be vacated because said convictions were obtained under a statutory procedural process that was patently unconstitutional and deprived the defendant of equal protection of the laws. Judge Lamm entered an order wherein it stated:

> "The Court having read said Application, the response thereto and having examined the files and records in each of these causes and being fully advised in the premises,
>
> "FINDS:
>
> "1. The defendant's Application raises no substantial issues of fact.
>
> "2. That the defendant was present with his privately retained counsel.
>
> "3. The defendant alleges in his Application for Post-Conviction Relief the following:
>
> " 'That at the age of 16 and 17 as a male he was prosecuted as an adult whereas a similarly-offending female would have been processed as a juvenile. 10 O.S. 1970 Supp., 1101. *Lamb* v. *Brown* (10th Cir., 1972), 456 F.2d 18; *Radcliff* v. *Anderson* (10th Cir., 1975), 509 F.2d 1093, cert. den. April 21, 1975, ___ U.S. ___.'

"4. The defendant was over sixteen (16) years of age but under eighteen (18) years of age at the time of the commission of offenses charged and to which the defendant entered his pleas of guilty and was sentenced without prior certification.

"5. That based on the citations of the petitioner that Post-Conviction Relief should be granted.

"6. That due to the citations of the State of Oklahoma and the Motion of the State advising this Court that the State intends to appeal this judgment, this Court finds that in the interest of justice that the execution of judgment should be stayed until the 3rd day of June, 1975."

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the defendant's Application for Post-Conviction Relief is hereby granted and the Judgment and Sentence in this cause is hereby vacated, and that this Order is stayed until the 3rd day of June, 1975. State allowed exception.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant is hereby released from custody. State allowed exception.

"Done in open Court this 9th day of May, 1975."

This Court finds the record indicates that the defendant was of the age of sixteen (16) and seventeen (17) years at the time of said convictions. Thus we find the defendant was, and properly so, dealt with as an adult at the time of his convictions, and it was, therefore, not necessary to afford a certification hearing on juvenile status in light of our recent decision in *Dean* v. *Crisp*, Okl.Cr., ... P.2d ... We, therefore, find Judge Margaret Lamm erred in entering an order granting the defendant post conviction relief in said convictions.

IT IS, THEREFORE, THE ORDER OF THIS COURT that Judge Margaret Lamm vacate her order of the 9th day

of May, 1975, granting the defendant post conviction relief in Case Nos. CRF-70-1327, CRF-70-1560, CRF-70-1910, CRF-70-1915, and CRF-70-2012.

IT IS THE FURTHER ORDER OF THIS COURT that Judge Margaret Lamm proceed in the above styled and numbered cases with immediate action not inconsistent with this order.

IT IS FURTHER ORDERED that the defendant's motion to dismiss be DENIED.

WITNESS OUR HANDS, and the Seal of this Court, this 10th day of June, 1975.

s/ C. F. Bliss, Jr.
C. F. BLISS, JR., JUDGE

s/ Hez J. Bussey
HEZ J. BUSSEY, JUDGE

ATTEST:

s/ Ross N. Lillard, Jr.
CLERK

[Seal]

APPENDIX "I"

FILED
In Court of Criminal Appeals
of the State of Oklahoma
JUN 9 1975
Ross N. Lillard, Jr.
CLERK

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel., S. M. FALLIS, JR., DISTRICT ATTORNEY OF TULSA COUNTY, OKLAHOMA, Petitioner,	)	
-vs-	)	No. O-75-247
HONORABLE ROBERT G. GREEN, DISTRICT JUDGE, TULSA COUNTY, OKLAHOMA, Respondent.	)	

ORDER ASSUMING ORIGINAL JURISDICTION, DENYING MOTION TO DISMISS BUT ISSUING WRIT OF MANDAMUS

On the 28th day of May, 1975, there came on for hearing pursuant to setting Petitioner's application to assume original jurisdiction and for writ of mandamus, the parties appearing as follows: Petitioner by Mr. Marvin Spears; the defendant, Delmer Eugene Hanley, in the lower court appearing by and through his attorney, Mr. Fred Gilbert; and the said Respondent not appearing in any manner, although duly notified by this Court.

The Court, after hearing statements and arguments of counsel and being fully advised in the premises, finds:

THAT this Court should and does hereby assume original jurisdiction herein and proceeds to hear and dispose of the petition for writ of mandamus as follows:

THAT on the 16th day of May, 1975, Petitioner filed in this Court for a writ of mandamus requesting this Court to issue an order vacating the order of The Honorable Robert G. Green, District Judge, Tulsa County, releasing on bond the defendant, Delmer Eugene Hanley, in Case Nos. 23,361, 23,362, and 23,363, pending the District Court's consideration and final decision of defendant's application for post conviction relief.

THAT Petitioner asserts that the District Judge exceeded his authority in allowing bond on an application for post conviction relief. This Court agrees and directs the Respondent's attention to Rule 4.1(C) of the Rules of this Court wherein it states:

> "*Bail Not Allowed.* No applicant for Post-Conviction Relief filed under the provisions of 22 O.S. 1971, § 1080 et seq. shall be entitled to bail by the trial court or the Court of Criminal Appeals pending the hearing of said Application, nor shall the provisions of 22 O.S. 1971, § 1080, be construed to vest the trial court with the authority to set bail."

This Court finds that Respondent, The Honorable Robert G. Green, District Judge, Tulsa County, was without authority to issue an order granting the defendant bond on the pendency of the defendant's application for post conviction relief.

In passing we note the defendant's application for post conviction relief, now pending in the District Court of Tulsa County requests relief based on the decisions in *Lamb* v. *Brown*, 456 F.2d 18 (10th Cir., 1972) and *Radcliff* v. *Anderson*, 509 F.2d 1093 (10th Cir., 1975). This Court directs the Respondent's attention to this Court's recent decision in *Dean* v. *Richard Crisp and The State of Oklahoma*, Okl.Cr., ... P.2d ...., for appropriate disposition of defendant's application.

IT IS, THEREFORE, THE ORDER OF THIS COURT that the Respondent, The Honorable Robert G. Green, District Judge, proceed immediately in the above styled and numbered cases to vacate his previous order granting the defendant bail and to proceed further with an appropriate action not inconsistent with this order.

IT IS THE FURTHER ORDER OF THIS COURT that defendant's motion to dismiss in the above styled and numbered cause be, and hereby is, DENIED.

WITNESS OUR HANDS, and the Seal of this Court, this 6th day of June, 1975.

s/ C. F. Bliss, Jr.
C. F. BLISS, JR., JUDGE

s/ Hez J. Bussey
HEZ J. BUSSEY, JUDGE

ATTEST:

s/ Ross N. Lillard, Jr.
CLERK

APPENDIX "J"

Gary Michael RUTLEDGE, Appellant,
v.
The STATE of Oklahoma, Appellee.
No. F-74-322.

Court of Criminal Appeals of Oklahoma.

Oct. 29, 1974.

An appeal from the District Court, Beckham County; Charles M. Wilson, Judge.

Gary Michael Rutledge, appellant, was charged, tried in a two stage proceeding and convicted of the crime of Distribution of a Controlled Dangerous Substance, LSD, After Former Conviction of a Felony. His punishment was assessed at ten (10) years in the State Penitentiary and he appeals. Judgment and sentence, affirmed.

Mary E. Bane and Thomas A. Williams, Bane & Williams, Oklahoma City, for appellant.

Larry Derryberry, Atty. Gen., James L. Swartz, Asst. Atty. Gen., for appellee.

OPINION

BLISS, Presiding Judge:

The appellant, Gary Michael Rutledge, hereinafter referred to as defendant, was charged, tried in a two stage proceeding before a jury and convicted in the District Court of Beckham County, Oklahoma of the crime of Distribution of a Controlled Dangerous Substance, LSD, After Former Conviction of a Felony, in Case number CRF-73-81. Punishment was assessed at ten (10) years in the State Penitentiary. From a judgment and sentence in conformance with said verdict, the defendant has perfected his timely appeal.

Briefly stated the evidence adduced at trial is as follows: Undercover agent Arthur Linville of the Oklahoma State Bureau of Investigation testified that in Elk City, Oklahoma, on January 24, 1973, he, in the presence of Nancy Standifer and others, purchased 12 tablets of what the defendant referred to as purple acid. After the tablets were properly marked and preserved, they were taken on the 29th day of January to the office of the Oklahoma Bureau of Investigation in Oklahoma City for chemical analysis. Linville received a copy of the chemist's analysis of the tablets on or about the 24th day of May, 1973. The tablets contained LSD.

On the 10th day of October, 1973, Linville and another agent went to Elk City to look for the defendant. On the 10th they found him at work at a local furniture manufacturing plant and arrested him for illegal distribution of a controlled dangerous substance. Linville testified that the delay from the January purchase to the October arrest was because there was a continuing investigation in the Beckham County area and that the arrest of the defendant prior to October would have allowed people to know that he was an undercover agent. Linville further stated that he returned to Beckham County only two times during the interim, that he could not remember the dates, and the Rutledge case was the only case growing out of his investigation in the area.

William J. Caveny, a forensic chemist with the Oklahoma State Bureau of Investigation, then testified that he ran chemical tests on the tablets and came to the conclusion that the tablets contained LSD. His report was completed on May 30, 1973. The State then rested with reference to the first stage of the two stage proceeding.

The defendant, testifying in his own behalf, related that he had lived in the Elk City area most of his life, and that in 1970 when he was sixteen years of age he was arrested on two counts of grand larceny, subsequently pleading guilty to both charges and serving a 2½ year sentence at Granite Reformatory. The defendant denied ever meeting Linville prior to his arrest and further denied meeting Ms. Standifer. He further stated that after his release from the reformatory he made up his mind not to get in trouble again, got married and had begun going to church.

Robert J. Young, a minister in Elk City, testified that he was acquainted with the Rutledges and had officiated at their wedding. He further stated that Gary had begun coming to church on his own and that he was well thought of by those in the church. The defendant's wife then testified that she and the defendant had recently married, that she married him knowing of his previous troubles and that he worked everyday.

On rebuttal the State called Nancy Standifer who testified that she knew Agent Linville and the defendant, that she met the defendant on January 24, 1973, in Elk City at an apartment, and that while there Linville purchased some tablets from the defendant. The defendant then took the stand and denied that he had seen Ms. Standifer at an apartment in Elk City on January 24, 1973.

After a verdict of guilty was returned, the second stage of the proceeding commenced and the jury assessed punishment at ten (10) years in the State Penitentiary.

Defendant's first proposition in error urges that the trial court committed reversible error in allowing evidence of prior felony convictions when defendant was seventeen years of age to be introduced to impeach the defendant's credibility and to enhance his punishment under 21 O.S. 1971, § 51. In support of his argument the defendant contends that since he was only seventeen years old at the time of his former convictions, those convictions could not be used either to impeach his credibility or to enhance his punishment, basing his argument on the decision of the Tenth Circuit United States Court of Appeals in Lamb v. Brown, 456 F.2d 18. The defendant further contends that

to use the pre-*Lamb* convictions to enhance punishment is a violation of the equal protection provisions of the United States Constitution.

[1] With these contentions we do not agree. In Fields v. State, Okl.Cr., 506 P.2d 219, we specifically held that pre-*Lamb* final judgments may be used to enhance punishment for post-*Lamb* convictions.

[2] The application of *Lamb* was held in the Circuit Court to be prospective and not retroactive. The federal Constitution does not compel in every case the retroactive application of a "new" constitutional ruling such as *Lamb*. See Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed. 2d 601, and Williams v. United States, 401 U.S. 646, 91 S.Ct. 1148, 28 L.Ed.2d 388. The *Lamb* court evidently considered a non-retroactive application of its decision to be warranted in light of all the circumstances. It is therefore our opinion, in light of *Lamb* and *Fields*, supra, it is not a violation of the equal protection clause to permit final pre-*Lamb* judgments to serve as the basis for post-*Lamb* enhancements of punishment and post-*Lamb* impeachments of credibility.

The defendant's last proposition in error urges that the defendant was denied his right to a speedy trial because of the lapse of time between the alleged commission of the offense and his arrest. The record reflects that the purchase was made on the 14th day of January, 1973, and the complaint was filed on the 10th day of October, 1973, some 8½ months later. In support of his proposition the defendant cites Grace v. Harris, Okl.Cr., 485 P.2d 757, which holds as follows:

> "Where the state knows of the commission of a crime, its apparent perpetrator, knows of the accused's location and even has custody of him on another charge, and fails to file a charge for nine months without showing good cause, the prosecution must be dismissed as a denial of the right to a speedy trial and due process of law."

However, *Grace*, supra, is factually distinguishable from the instant case in that it dealt with the inferential penalization of a defendant for appealing a conviction in a related case.

[3] It is the opinion of this Court that if an information is filed well within the statute of limitations then a delay between the date of the commission of the alleged crime and the filing of said information would not constitute a denial of one's own constitutional right to a speedy trial or be violative of the principles of due process unless it was shown at trial that said delay caused substantial prejudice to defendant's right to a fair trial and that said delay was not reasonable. See United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468; Kovash v. State, Okl.Cr., 519 P.2d 517; and Delaney v. State, Okl.Cr., 507 P.2d 564.

[4] In the instant case the defendant wholly fails to show wherein the delay complained of prejudiced any substantial right of the defendant. Therefore, defendant's last proposition in error is without merit.

For the reasons set out above, the judgment and sentence appealed from is, accordingly, affirmed.

BRETT, J., concurs in part, dissents in part.

BUSSEY, J., concurs.

BRETT, Judge (concurs in part and dissents in part).

I concur that there was sufficient evidence before the jury to find the defendant guilty of unlawful distribution of LSD, and that under the cricumstances of this case the information was properly filed; but I respectfully dissent to that part of the majority decision which authorizes the use of the convictions sustained by the defendant when he was sixteen years old to enhance the punishment.

I believe further that the trial court committed error when the jury was instructed on the second stage of the

proceedings; consequently, the prosecution failed to meet its burden of showing the sufficiency of the former convictions. The jury was left to presume, and this Court is asked to further presume from a silent record, that defendant's former convictions were proper. "Presuming waiver from a silent record is impermissible." Carnley v. Cochran, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70.

The record before this Court reflects that defendant testified on cross-examination that he was convicted on two charges of grand larceny when he was sixteen years old. At the time the court instructed the jury that the testimony was being admitted only to test defendant's credibility. However, at the second stage of the trial the court instructed the jury, "The defendant admits in open court the prior convictions so no evidence will be presented to you to establish this fact and you are to take as admitted facts such convictions." Consequently, the prosecutor did not introduce the judgments and sentences or make any showing that the defendant was represented by counsel or properly waived counsel at the time, or that the pleas of guilty were knowingly and intelligently entered. All that was shown was that the defendant admitted the convictions, and that he was sixteen years of age when he entered his pleas of guilty.

Likewise, I believe this decision should be held in abeyance until the Tenth Circuit, United States Court of Appeals resolves the question of retroactivity of Lamb v. Brown, 10 Cir., 456 F.2d 18 (1973). That Court presently has before it on rehearing its consolidated decision in Radcliff v. Anderson, No. 73-1520, and Stringfield v. Grider, 73-1550. In the original decision, which was withdrawn, that Court commented "The statement that its ruling should not apply retroactively, see [Lamb v. Brown] 456 F.2d at 30, is dictum which arises no higher than 'comment merely obiter,'" and held that "here fairness" plus "essential justice" require that the Lamb decision be applied retroactively. Should the Honorable Circuit Court maintain that position on rehearing, the question which this majority decision purports to settle, and others pertaining to juvenile convictions, will again become viable. Therefore, discretion dictates that the majority decision in this appeal is prematurely rendered.

I concur that the conviction for distribution of LSD should be affirmed, but I dissent to the enhancement of punishment on the juvenile convictions, and would modify the sentence imposed.

APPENDIX "K"

FILED
In Court of Criminal Appeals
of the State of Oklahoma
AUG 2 1974
Ross N. Lillard, Jr.
CLERK

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

LOUIS JAY BROMLEY,)
Appellant,)
-vs-) No. PC-74-474
THE STATE OF OKLAHOMA,)
Appellee.)

ORDER AFFIRMING DISTRICT COURT'S DENIAL OF POST CONVICTION RELIEF

In the District Court of Oklahoma County, Case No. CRF-71-2636, Appellant was convicted for the offense of Assault and Battery with a Dangerous Weapon. His punishment was fixed at three (3) years imprisonment. Thereafter, he filed an application for post conviction relief in the District Court of Oklahoma County wherein the court denied said request. From said denial, Appellant has perfected a timely appeal to this Court.

Appellant alleges that he was under the age of eighteen (18) years at the time he entered his plea of guilty for the above offense. He was not certified by the juvenile division of the District Court to be tried as an adult, and consequently, the District Court of Oklahoma County was unable to receive his plea of guilty as it did not maintain jurisdiction over his person. In light of the decision in *Lamb* v. *Brown*, 456 F.2d 18 (Tenth Circuit, 1972) which has been

held retroactive by two recent decisions of the Tenth Circuit, we find the District Court did not err in denying said relief.

Noting first that the decision in *Lamb* v. *Brown* recites that said holding is not to be retroactive and that the authority cited by Appellant is not final authority, said cases still pending rehearing by the Tenth Circuit in banc, we find the language in *Lamb* v. *Brown*, which cites it is not to be retroactive still the law which prevails over the instant case. Secondly, we note we are constrained to follow our holding in *Schaffer* v. *Green*, Okl.Cr., 496 P.2d 375 (1972) and *Freshour* v. *Turner*, Okl.Cr., 496 P.2d 389 (1972), wherein we held the issue of retroactivity to be moot in light of those decisions.

IT IS, THEREFORE, THE ORDER OF THIS COURT the District Court's denial of post conviction relief be, and hereby is, affirmed.

WITNESS OUR HANDS, and the Seal of this Court, this 2nd day of August, 1974.

s/ C. F. Bliss, Jr.
C. F. BLISS, JR., PRESIDING JUDGE

s/ Hez J. Bussey
HEZ J. BUSSEY, JUDGE

ATTEST:

s/ Ross N. Lillard, Jr.
CLERK

[Seal]